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No. _____

In The

Supreme Court of the United States

October Term, 1995

JAMES E. DOYLE, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND ALAN T. TRACY, IN HIS CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Petitioners,

v.

TIME WARNER CABLE, A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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120 pp

QUESTION PRESENTED

The 1992 Cable Act prohibits a cable operator from negative option billing, *i.e.* billing a customer for a cable service that the customer has not ordered by name. It also mandates that nothing in the Cable Act is to be construed to prohibit the enforcement of a state consumer law unless the state activity is "specifically preempted" by the Cable Act. The Cable Act specifically preempts states from the regulation of rates.

The Federal Communications Commission promulgated rules which it claims further interpret the statutory ban on negative option billing. The Commission, and the Seventh Circuit below, have determined that these rules preempt Wisconsin's state consumer action seeking to enjoin, under state law, certain negative option billing practices. The Seventh Circuit's stated legal basis for the preemption is that the Wisconsin action conflicts with the "rate structure" embodied in the Commission's rules on negative option billing.

The question presented is whether Congress granted the Federal Communications Commission the authority to preempt Wisconsin's consumer action on the grounds that it conflicts with the "rate structure" it has established by rule, notwithstanding the Congressional ban on construing the Cable Act against state consumer actions unless those actions are specifically preempted by the Cable Act. It is unclear whether the preemption found by the Seventh Circuit is based on the "conflict" between the Commission rule and the state action or whether it is founded on the Congressional ban on state rate regulation.

LIST OF PARTIES

The parties to the District and Circuit court proceedings were petitioners James E. Doyle, in his capacity as Attorney General of the State of Wisconsin and Alan T. Tracy, in his capacity as Secretary of the Wisconsin Department of Agriculture, Trade & Consumer Protection and respondent Time Warner Cable, a division of Time Warner Entertainment, L.P.

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PETITION FOR WRIT OF CERTIORARI

Petitioners James E. Doyle and Alan T. Tracy, respectfully pray that a Writ of Certiorari issue to review the ruling of the Seventh Circuit Court of Appeals entered on September 25, 1995.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin is reported at 847 F. Supp. 635 (W.D. Wis. 1994) and reproduced at App. 1-18.

The opinion of the United States Court of Appeals - Seventh Circuit is reported at 66 F. 3d 867 and reproduced at App. 19-56.

JURISDICTION

The Court of Appeals entered judgment on September 25, 1995. There was no petition for rehearing. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article VI cl. 2 of the United States Constitution.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

A. Summary

In August 1993, the State of Wisconsin sued Time Warner,[1] under a state law prohibiting unfair trade practices, for billing its customers for certain "a la carte" cable channels that had not been ordered. The Seventh Circuit, in its September 25, 1995 decision, App. 19-56, held that FCC rules interpreting a federal prohibition

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[1] App. 72-75.

against negative option billing,[2] preempted the state action because it conflicted with the "rate structure" established in the FCC rules, App. 48. This conclusion was reached notwithstanding a 1992 Cable Act provision[3] which explicitly stated that the Cable Act was not to be construed to prohibit the enforcement of a state consumer protection action unless the subject of that action was "specifically" preempted by the Act.

The Seventh Circuit appears to base its conclusion on the fact that the FCC negative option billing rules were part of the Commission's administrative "rate structure," App. 47, with which a state action may not conflict, and on the fact that restitution portions of the state action constituted "rate regulation," as prohibited by the Cable Act,[4] App. 48.

The Seventh Circuit's expansion of Cable Act preemption casts a cloud on all consumer actions that may have some indirect effect on the rates charged by a cable operator or that conflict with the FCC "rate structure." As stated, at App. 55-56, in the dissent to the Seventh Circuit's decision, by designated Judge Warren J. Ferguson of the Ninth Circuit:

> This reasoning, taken to its logical end, is also potentially unbounded as it results in all state consumer laws being classified as "rate structures." Such an interpretation would require all consumer protection laws

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[2] 47 U.S.C. § 543(f) Negative option billing prohibited. A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. . . .

[3] 47 U.S.C. § 552(c)(1).

[4] 47 U.S.C. § 543(a)(1).

> to be preempted since all such regulation potentially affects cable rates-albeit indirectly. . . . The statutory language is unambiguous and, as a result, there is no need to examine the reasonableness of the interpretation given to the statute by the FCC. The plain meaning of the language of the 1992 Cable Act establishes that the Wisconsin consumer protection law is not preempted.

Unless resolved by this Court, state consumer actions will, in the future, proceed under the cloud of potential preemption if the FCC, or an interpreting court, concludes that a particular state consumer action interferes with the FCC rate structure or is regulating rates by requesting restitution of illegally obtained billing proceeds.

B. Background

In October 1992, Congress amended the Cable Act, 47 U.S.C. §§ 521-559.[5] This amendment contained a prohibition against negative option billing, providing that a cable operator may not charge a subscriber for a service "that the subscriber has not affirmatively requested by name," 47 U.S.C. § 543(f).

Although its plain language, and legislative history,[6] indicate that this prohibition was intended to

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[5] The legislation is referred to as the Cable Television Consumer Protection and Competition Act of 1992. It amended the Cable Communications Policy Act of 1984. The Cable Act is found in Subchapter V-A-Cable Communications, 47 U.S.C. §§ 521-559.

[6] Senator Gorton, the author of the Senate version eventually accepted in Conference committee, 1992 U.S.C.C.A.N., (continued...)

protect consumers from being billed for unordered services, the Federal Communications Commission enacted a rule[7] pursuant to this prohibition which purports to, and which the Seventh Circuit concluded does in fact, *authorize* certain negative option billing practices such as those involved in the Wisconsin action.

The Seventh Circuit concluded, App. 47-48, that the FCC rule interpreting the federal negative option provision preempted Wisconsin's consumer action,[8] based on state unfair practice laws, that sought to enjoin Time Warner from billing its customers for cable services which had never been ordered by name. The basis for this conclusion was that the FCC regulation on negative options was intended to protect the "rate structure" it was charged to develop by the Cable Act and that state enforcement efforts would conflict with this process by discouraging the provision of new services at a reasonable cost[9] and by requiring "disgorgement" of illegally obtained profits.[10]

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[6](...continued)
Vol. 4, p. 1247, stated "I am introducing legislation today . . . which will prohibit the negative option and will *protect consumers* from this type of abusive practice." *Congressional Record - Senate, June 4, 1991, p. S 7048.* (emphasis supplied).

[7] The 1993 version is at App. 70. and the 1994 version (effective January 1, 1995) is at App. 71.

[8] App. 72-75.

[9] The Court indicated that the state prohibition "would act as significant incentive to carriers to freeze service offerings." App. 47-48.

[10] The Seventh Circuit concluded that this would be the equivalent of requiring Time Warner to "provide the service for free", App. 47.

C. The State Administrative Action.

On August 31, 1993, the State of Wisconsin brought an administrative action against Time Warner, App. 72-75, concerning its anticipated September 1, 1993, use of a practice commonly referred to as "negative option billing."

On September 1, 1993, Time Warner restructured part of its cable service when it "unbundled" two channels (WGN and WTBS) from its "Basic" service tier and two channels (Discovery and E-TV) from its "Standard" service tier[11] and converted each of them to stand-alone, and optional, "a la carte" channels. Each of the unbundled "a la carte" channels was then subject to its own separate rate and could be purchased, or not purchased, "by name" in the same manner as a movie channel such as HBO.

Nothing in the state action challenged Time Warner's restructuring or its unbundling process. Wisconsin's sole objection to Time Warner's activities was that its customers would be "assessed . . . a charge for certain stand alone channels which have not been ordered, by name, by any cable customer." App. 73.

The charge for each unbundled channel was $1.04, although it could also be ordered as part of a package for $2.92, App. 73. The price of the now diminished "Basic" and "Standard" tiers was reduced, at the time of unbundling, so that the total price of all channels, including the now optional "a la carte" channels, was

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[11] A "service tier" is a category of cable service "for which a separate rate is charged by the cable operator." 47 U.S.C. § 522(16). Each multi-channel service "tier" is subject to a "separate rate" and is ordered by its name, as are the "a la carte" channels. The individual channels within a multi-channel service tier are not ordered by name and do not have a separate rate and are not subject to selection or deselection.

approximately the same as paid for the two service tiers before the change, App. 21.

By "unbundling" the four channels, and reducing the price of the multi-channel service tiers from which they came, Time Warner faced the risk of lost revenue from those customers that would not select the new, and optional, "a la carte" channels. By billing for them as if they had been ordered, i.e. by negative option, Time Warner minimized this risk.

The likely reason for risking decreased revenues was that these " a la carte" channels, although part of a "revenue neutral" package at the time of unbundling, App. 21, would not be subject to the rate regulation about to be imposed by the FCC on the "Basic" and "Standard" tiers. 47 U.S.C. § 543(c)(1)(A) authorizes the FCC to establish rates for "cable programming services." Pursuant to 47 U.S.C. § 543(l)(2)(B), a video programming service offered on a "per channel or per program basis" (such as HBO or an "a la carte" channel) is excluded from this category and is therefore not subject to rate regulation.[12]

Pursuant to sec. 100.20(3), Wis. Stats., App. 68, the Wisconsin action sought injunctive relief and the disgorgement of income[13] obtained as the result of the alleged illegal practices. Wisconsin alleged, at App. 74, that Time Warner's practice of billing some of its Wisconsin customers for cable services that they had never

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[12] This also raises the question whether the Seventh Circuit's "rate structure" and rate regulation basis for preemption apply to the instant case since the "a la carte" offerings in question are, by Congressional decree, **not** subject to rate regulation.

[13] App. 75. The demand for disgorgement was later dropped as part of a stipulation with Time Warner. While disgorgement might be awarded as part of an injunctive remedy under sec. 100.20(3), it is not statutorily authorized.

ordered by name was an unfair trade practice as prohibited by sec. 100.20(1), Wis. Stats., App. 67.

Although its premise was similar to the Cable Act's prohibition of negative option billing, the Wisconsin action against Time Warner was not premised on this law. The precedent for the Time Warner action was established by a July 28, 1993, injunction entered in an earlier Wisconsin administrative action, brought under the statutory and administrative framework of sec. 100.20, Wis. Stats., against another cable operator, Tele-Communications Inc. (TCI), App. 76-80.

D. Time Warner's Federal Action.

Time Warner contended that the FCC's rules on negative option billing, App. 70, 71, or related comments, preempted Wisconsin from seeking to enjoin them, under its consumer laws, from the negative option billing activities alleged in the state action. Accordingly, on September 21, 1993, Time Warner brought an action in United States District Court for the Western District of Wisconsin, to which petitioners did not object,[14] for the purpose of resolving the preemption issue created between the Wisconsin action and the FCC regulatory process.[15]

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[14] The majority, App. 29-30, n.6, and dissent, App. 49-54, both discussed abstention issues in respect to this action. Petitioner did not, and does not, object to the federal review of this state action. The state action presented no factual disputes, since the matter was presented to the District Court on cross summary judgment motions, and the state legal issue on the legality of negative option billing had been clearly delineated in the TCI Special Order, App. 76.

[15] The action sought declaratory and injunctive relief on the grounds that Wisconsin was preempted under the Supremacy Clause, U.S. Constitution, Art. VI. Jurisdiction was claimed pursuant to 28 U.S.C. § 1391(b).

The issue was presented to the court through cross motions for summary judgment.

E. Federal Legislation Affecting The Issue Presented.

At all times relevant to these proceedings, there existed three sections of the 1992 Cable Act that directly related to the issue of administrative preemption presented here.

47 U.S.C. § 543(f):

> Negative option billing prohibited. A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

47 U.S.C. § 543(a)(1):

> No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. . . .

47 U.S.C. § 552(c)(1):

> Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to

> the extent not specifically preempted by this subchapter.[16]

The 1984 predecessor to 47 U.S.C. § 552(c)(1), 47 U.S.C. § 552(c), was the same, except for the last phrase, which read "to the extent not inconsistent with this subchapter."[17]

F. The District Court Opinion.

On March 17, 1994, District Chief Judge Crabb denied Time Warner's summary judgment action and granted petitioners' cross motion, App. 17.[18] She found that if Time Warner's contention that the FCC rule preempted Wisconsin's negative option billing action was correct then "the FCC has acted outside its delegated authority in promulgating the regulation," App. 9. The District court further stated, at App. 11:

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[16] "Subchapter" means the Cable Act, Subchapter V-A-Cable Communications, 47 U.S.C. §§ 521-559.

[17] The legislative history to this change expressed a clear Congressional intent. The Conference Report on the Cable Act stated "Section 632(c) makes it clear that nothing in Title VI [47 U.S.C. §§ 512-559] is intended to interfere with the authority of a state or local governmental body to enact and enforce consumer protection laws, *to the extent that the exercise of that authority is not specifically preempted by the Title.*" *Congressional Record - House, September 14, 1992, p. H 8328* (emphasis supplied).

[18] On November 15, 1995, the District Court, upon the Court of Appeals decision, ordered "that the judgment for defendants Doyle and Tracy entered herein on March 21, 1994 is VACATED. Judgment is hereby entered for plaintiff Time Warner Cable, prohibiting defendants Doyle and Tracy from enforcing the provisions of Wis. Stat. 100.20 against the billing practice challenged in this action."

> If plaintiff's assessment of the FCC action is correct, the FCC has made a determination foreclosed to it by Congress. Under plaintiff's interpretation, the regulatory negative option prohibition would permit a cable operator to charge for a service that at one time was part of a tier the customer requested by name but was not requested by name itself. The express language of the statutory negative option prohibition requires a cable operator to obtain a request for a given service by name before the operator may charge for that service. It appears that the FCC would be permitted to construe 47 U.S.C. § 543(f) in a manner consistent with plaintiff's interpretation had Congress not specified that an "affirmative request" must be "by name." Because Congress did so specify, the FCC is not free to ignore the "by name" requirement.

The District Court also found, App. 17, that Wisconsin's regulation of negative option billing is not preempted because "Wisconsin's regulation of negative option billing does not constitute the regulation of cable rates." At App. 15, the District Court stated:

> . . . cases decided under the Cable Communications Policy Act of 1984 establish that a statute that preempts state "regulation of rates" does not preempt state regulation of matters that may affect cable rates indirectly, *Cable Television Ass'n v. Finneran*, 954 F.2d 91, 101 (2d Cir. 1992).

G. The Opinion Of The Seventh Circuit Court of Appeals.

In its September 25, 1995, decision, App. 19-56, the Court of Appeals concluded, App. 47-48, that the FCC regulation on negative option billing was a permissible interpretation of the prohibition of negative option billing in 47 U.S.C. § 543(f), that it was preemptive and, at App. 48, stated that:

> the fact of the matter is that the Wisconsin consumer protection statute was preempted at the time that the Wisconsin Attorney General commenced the state action against Time Warner.

(1) Type of Preemption.

At App. 31-34, the Court discusses the fact that conflict preemption through federal regulations can be appropriate even if preemptive intent is implicitly contained in the structure and purpose of the law, citing *Fidelity Fed. Sav. & Loan v. De La Cuesta*, 458 U.S. 141, 152-53 (1982). It further refers, App. 32 n. 7, to this Court's decision in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483, 1487-88 (1995) for the premise that implied preemption can exist even in the presence of specific preemption language in the enabling legislation.

In respect to "conflict" preemption, the Seventh Circuit concluded, App. 48, that:

> In our view, the statement of the FCC in its Going Forward Order is a rational expression of the same theme that it has articulated throughout its pronouncements on negative option billing: The rate structure is a federal matter and state

> consumer laws that impact upon it conflict with the operation of the rate structure.

At App. 47, the Court indicates that certain aspects of the state action involved rate regulation, prohibited by the Cable Act, and concluded that due to the state's request for disgorgement:

> Time Warner essentially would have been required to provide the service for free. However, as noted above, the Cable Act prohibits the State from regulating the rates Time Warner charged for this service.

It is unclear whether the decision is stating (1) that the rule on negative option billing, in itself, creates a potential conflict with state consumer actions on the same subject, (2) that the rule relates to matters involving the "rate structure" and thereby preempts by virtue of the explicit preemption of the regulation of rates in § 543(a)(1), or (3) that portions of the state action, such as its request for disgorgement, are in themselves rate regulation.

(2) Need For An Administrative Regulation.

In concluding that the FCC regulation was a permissible interpretation of an ambiguous statute, the Court of Appeals, App. 35, referred to the Supreme Court's analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and stated that *Chevron* "provides the matrix for our analysis."

The Court found, App. 36, in respect to the need for a regulation:

> . . . we cannot conclude that the intent of the Congress is so unambiguously stated as to preclude further interpretation by the

> agency charged with the administration of the statute . . . the statutory language does not, by its own force, answer the question of whether the unbundling or the mere relabeling of existing services was intended to trigger the statutory obligation to solicit an affirmative request by the customer before the service can continue. A literal interpretation of the statute also would require affirmative marketing to the customer each time a station was substituted - a very burdensome requirement producing significant compliance costs that would be difficult to reconcile with the contemplated rate regulation scheme.

This critical juncture in the Seventh Circuit's *Chevron* analysis was founded on two premises, which are less than compelling. One, that "unbundling" or "mere" relabeling would trigger an unacceptable requirement to solicit an affirmative request from the customer and two, that the law created an anomalous situation by prohibiting the "substitution" of channels within a tier.

"Unbundling" or relabeling a channel, or in the terms of the FCC rule, App. 71, the "restructuring or division of existing tiers," was not the subject of the state consumer case. However, reference to these terms begs the question whether their use violates state law or the negative option prohibition in 47 U.S.C. § 543(f). If they do, then the rule cannot authorize that which the law prohibits. *De minimis* "relabeling" or "unbundling" issues can be resolved in ways other than preempting state consumer protection cases. This leaves the Court's analysis dependent on a "rate" preemption premise.

On the issue of requiring an affirmative order for station "substitution," if the court means that which

Congress stated in its legislative history on the section, i.e. that a change in the "mix" of programming services *"included"* in a tier of cable service was not in violation of § 543(f),[19] then administrative interpretation is unnecessary, particularly in light of explicit legislative history on the point.

The statutory provision, 47 U.S.C. § 543(f), states that a cable operator cannot bill for a service unless it has been "affirmatively requested by name." It would seem clear that the provision applies only to cable services that can, in fact, be ordered by name. While a multi-channel service tier, such as Time Warner's Standard tier, or an "a la carte" service, can be ordered by name, a "station" within a multi-channel service cannot be ordered "by name," thus the plain language of the statute indicates that such a "station," or its substitution or renaming, would not be within the law's coverage.

It is entirely problematical that an explanatory regulation was necessary on these points, particularly when used as the basis for supporting a rule found by the court to have preemptive effect. Wisconsin's action made no claim that Time Warner had violated its law by unbundling its channels or substituting them within an ordered service.

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[19] "The language adopted by the conferees ensures that cable operators will not be able to charge customers for tiers or packages of programming services or equipment that they do not request as well as individually priced programs or channels. This provision is not intended to apply to changes in the *mix of programming services that are included in various tiers of cable service.*" *Conference Report, 1992 U.S.C.C.A.N., Vol. 4, p. 1247.* (emphasis supplied).

(3) The Reasonableness Of The FCC Rule.

The Seventh Circuit's next step of the *Chevron* analysis reviewed the reasonableness of the FCC rule, App. 37. In discussing 47 U.S.C. § 552(c)(1), the provision precluding construction of the Cable Act against a state consumer action unless it was "specifically" preempted by the Cable Act, the Court concluded, App. 40, that the FCC's decision not to preempt all state consumer actions as meeting the requirements of § 552(c)(1), even though the court eventually construed the Commissions rules as preempting Wisconsin's consumer case.

The Seventh Circuit's conclusions concerning the impact of 47 U.S.C. § 552(c)(1) on the FCC rule leave that provision open to an interpretation that any time the FCC wishes to prevent a state from engaging in activities that conflict with its regulatory efforts, it can declare a "specific" preemptive "conflict" with state law and circumvent the direct mandate of Congress that state consumer actions are not to be preempted unless they have been "specifically" preempted by the Cable Act.

The Court reviewed the extensive comments and changes in the FCC rulemaking procedures regarding negative option billing, App. 40-46.[20] and concluded, App. 46-48, that they were valid efforts to protect the "rate

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[20] This included the FCC's midstream pronouncement, cited at App. 43, that § 543(f) was "more in the nature of a consumer protection matter rather than a rate regulation provision, *per se*." and that, pursuant to § 552(c)(1), the states "generally would possess concurrent jurisdiction to regulate negative option billing practices."

structure"[21] when challenged by state action, at App. 46 the court stated:

> Our review of the FCC's various pronouncements on the issue of preemption reveals, as the statutory structure also suggests, a tension between two policy concerns--federal control of those matters that impact upon the rate structure and state freedom to enforce consumer protection measures in those areas that do not affect the rate structure. Throughout the history of the FCC's multifarious pronouncements, it seems clear that the agency consistently has reconciled this tension by opting for the protection of the rate structure whenever that structure is jeopardized by the application of state consumer protection legislation. We cannot say that this interpretation of section 543(f) is inconsistent with the Cable Act.

The Seventh Circuit's pronouncement raises the significant question whether the FCC rule, in itself, is appropriate. The rule, App. 71, purportedly deals with negative option billing, but its terms deal with state enforcement actions "undermining" non-billing issues such as "restructuring or division or existing tiers of service." These policies do not deal with billing except to the extent that state restrictions on billing for services unordered "by name" hamper these goals. Taken literally, these state restrictions mirror the explicit provision of the Congressional prohibition of negative option billing in the Cable Act. As stated by the District Court, at App. 11, "the

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[21] Reference to the "rate structure," rather than the policies expressed in the section on negative option billing would appear to indicate some reliance by the Court on the specific preemption against "rate regulation" by the state.

FCC has made a determination foreclosed to it by Congress" because its preemption permits Time Warner to bill for cable services which were not ordered "by name."

Further, as previously argued, the rule's concern for the "deletion of a specific channel offering" or the "addition or deletion of a specific channel from an existing tier or service" is superfluous in light of the fact that the federal negative option prohibition deals only with cable services that can be ordered by name and does not concern itself with changes within a named multi-channel cable tier.

Finally, whatever the Commissions goals, the Congressional ban on negative option billing, and any rule promulgated thereunder, is not related to the regulation of rates except to the extent that requiring a cable operator to bill only for ordered services creates the potential for lost revenues and additional expenses connected with obtaining an "affirmative order" for a cable service. This would be particularly true for "restructuring" channels in such a manner that the "unbundled" channel would be exempt from rate regulation.

(4) Degree Of FCC Regulation Necessary To Protect The "Rate Structure."

With regard to the relationship between negative option billing and the "rate structure" protected by the Commission rule, the Court, at App. 47-48, stated:

> . . . The transaction costs involved in complying with a state negative billing prohibition would impact on the [FCC] rate rules by discouraging the provision of new services at a reasonable cost. Such a state prohibition would act as significant incentive to carriers to freeze service offerings. Local law would in effect set rates by discouraging

> the addition, deletion or replacement of channels, even when the change worked no fundamental alteration in the nature of the tier. . . . The rate structure is a federal matter and state consumer laws that impact upon it conflict with the operation of the rate structure.

By declaring that the "rate structure is a federal matter" the Court appears to reference the rate preemption provisions of the Cable Act as the underpinning of its analysis. In any such analysis the dichotomy created by this Court's in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 377 (1992) must be considered between preemptive language limited to state activities that "regulate" and those that are "related to regulation." The "regulate" language is limited to actual regulation, clearly not the indirect effects cited above by the Seventh Circuit.

The same considerations must be applied to the Court's analysis regarding the State's attempt to obtain the return of illegally obtained billing proceeds.[22] The Court, at App. 47, concludes, "in assessing the reasonableness of the federal regulation" that the state action was not "saved" (by § 552(c)(1)) because it was regulating rates:

> Were the State to order Time Warner to turn over all of its receipts from the sale of the a la carte service, Time Warner essentially would have been required to provide the service for free. However, as noted above, the Cable Act prohibits the State from regulating the rates Time Warner charged for this service. Accordingly, the FCC acted reasonably to the extent its

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[22] The State originally sought the return of funds which, it alleges, were illegally obtained through negative option billing practices, App. 75.

> regulation preempts the state statutory remedy of disgorgement of the revenue earned under the disputed billing practice.

(5) The Seventh Circuit's Conclusions.

The Court concludes, at App. 48, its evaluation of the FCC regulatory effort by finding in the Commission's Going Forward Order:

> . . . a rational expression of the same theme that it has articulated throughout its pronouncements on negative option billing: The rate structure is a federal matter and state consumer laws that impact upon it conflict with the operation of the rate structure. . . . The simple fact of the matter is that the Wisconsin consumer protection statute was preempted at the time that the Wisconsin Attorney General commenced the state action against Time Warner.

REASONS FOR GRANTING THE PETITION

Although the 1992 Cable Act dealt with the re-regulation of rates for cable providers, and placed the regulation of those rates principally in the hands of the Federal Communications Commission, protection of the consumer on day-to-day and local[23] matters, such as

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[23] The billing practices challenged in the State case were restricted, by Time Warner, to certain geographical areas in Wisconsin, App. 73-74. They are not uniform at the state level, much less at the national level.

billing,[24] remains in the hands of state and local authorities. Relief sought under state consumer statutes, such as sec. 100.20, Wis. Stats. (App. 67), frequently involves injunctive and restitutionary relief. For example, sec. 100.20(6), Wis. Stats. permits the institution of an action for temporary or permanent injunction and authorizes the court to make:

> such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action.

The decision by the Seventh Circuit places any such state action as would seek restitution or increase a cable operator's "transaction costs," App. 47, within the potential sweep of "rate regulation," or "conflict" type preemption, according to the changing analysis of an administrative agency.

On the issue of state consumer protection laws, the Congressional Conference report on the new Cable Act states:

> Section 632(c) [47 U.S.C. § 552(c)] makes it clear that nothing in Title VI is intended to interfere with the authority of a state or local governmental body to enact and enforce consumer protection laws, to the extent that the exercise of such authority is not specifically preempted by the Title. . . .

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[24] 47 U.S.C. § 552(c)(2), authorizes local "customer service requirements" that "exceed the standards established by the Commission . . . ." The term "customer service requirement" includes "communications between the cable operator and the subscriber *(including standards governing bills and refunds)*", 47 U.S.C. § 552(b)(3). (emphasis supplied).

1992 U.S.C.C.A.N. at 1133, 1260.

How could Congress have made it any clearer? The bedrock of consumer protection is at the state level. State actions to prevent practices such as billing for services that were not ordered, and seek the return of ill gotten gains,[25] are critical to assure adequate protection of the 60% or more of this country's population that receives cable television services. The FCC is in no position to enforce these state level violations in a manner which could return consumers to their economic status prior to the illegal acts.[26]

The uncertainty created by the Seventh Circuit for all consumer protection actions, present and future, is significant. Expanding the concept of "rate regulation" to one of an administratively created "rate structure," based on a federal prohibition of negative option billing, would place a cloud over most consumer actions against wrongdoers whose rates are regulated at the federal level.

I. THE DECISION OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE NINTH AND SECOND CIRCUITS.

On the issue of rate regulation preemption, *Total TV v. Palmer Communications*, (No. 94-55112 - 9th Cir.) decided October 24, 1995, App. 57-66, has held that the California Unfair Practices Act is not preempted by the rate regulatory framework of the 1992 Cable Act. Total TV alleged Palmer was engaged in predatory pricing, contrary to § 17043 of the California Unfair Practices Act:

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[25] *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

[26] It appears that the FCC has the right to seek forfeitures pursuant to 47 U.S.C. § 503.

> It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof. . . . for the purpose of injuring competitors or destroying competition.

In *Total TV*, the state sanctioned relief sought came much closer to the rate regulation theory expressed by the Seventh Circuit on the subject of Wisconsin's request for "disgorgement."[27] The California law sets a base price for all cable services, i.e. cost.

The *Total TV* court, App. 63, discussed the difference between a federal law which preempts the "regulation of rates" from matters "related to regulation.":

> The Supreme Court has differentiated between the phrases "regulate" and "related to regulation." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 377, (1992) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). The former is associated with a more limited preemptive intent. The latter phrase, which is not used in § 543(a), signifies a broad preemptive purpose sufficient to preempt state laws of general application such as the UPA. Other courts have held similarly regarding the preemptive scope of § 543. *See Cable Television Ass'n v. Finneran*, 954 F.2d 91, 101 (2d Cir. 1992).

The Court also referred, App. 63-64, to a Congressional note to 47 U.S.C. § 521 stating:

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[27] App. 26. "[T]he FCC acted reasonably to the extent its regulation preempts the state statutory remedy of disgorgement of the revenue earned under the disputed billing practice."

> [n]othing in [the Cable Television Consumer Protection Act of 1991] shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law." 47 U.S.C. § 521 note, 106 Stat. 1503 ("§ 27").

This language is similar to that in 47 U.S.C. § 552(c)(1), essentially ignored by the Seventh Circuit, except that § 552(c)(1) permits limitation of consumer protection cases only when they are "specifically preempted by [the Cable Act]."

On the issue whether the Congressional note in § 521 would "effectively nullify" the rate preemption in § 543(a)(1), similar to the Seventh Circuit's "disgorgement" analysis, the *Total TV* Court, at App. 65, stated:

> There is a wide range of competitive rates that a cable company could establish that are neither excessive nor below cost. As the district court noted, § 27 and § 543(a)(1) can be reconciled by giving effect to both sections through a reasonable interpretation based on the history and purpose of the Cable Acts. We adopt the district court's suggestion that "[i]n light of the clear mandate of Section 27 that state antitrust laws not be preempted, § 543(a)(1) applies only to those situations involving a statute (or local ordinance) directly aimed at the cable industry and affecting or regulating rates."

The *Total TV* Court, App. 65-66, also rejected, language in 47 U.S.C. § 556(c), which provides that "any provision of law of any State . . . which is inconsistent with this chapter shall be deemed to preempted and superseded," as a basis for preempting the California Unfair Practices Act. It held that the provision was simply

a "recognition the Congress did not intend to fully occupy the field of cable television regulation." The language in § 556(c) is more susceptible to a preemption analysis than that in § 552(c)(1). Section 552(c)(1) was amended in 1992 to replace the "inconsistent" language with language requiring that state consumer cases be "specifically preempted."

The *Total TV* court, at App. 60, thus concluded:

> We hold that the Cable Acts do not preempt the provisions of the UPA--because these provisions do not regulate the appellant's rates . . . the UPA provisions in question do not operate to regulate rates within the meaning of the Cable Acts' preemption clause. Nowhere in the legislative history of either Act is there a suggestion that "rate regulation" includes predatory pricing or price discrimination measures.

In *Cable Television Ass'n v. Finneran*, 954 F.2d 91, 100-102 (2nd Cir. 1992), the court was faced with the question whether regulation of a downgrade charge (a fee to drop a cable service) established by the State of New York was subject to the specific preemption of state regulation of rates in § 543(a) of the 1984 Cable Act.[28] The action was brought by the Cable Television Association of New York.

While the court agreed that state regulation of downgrade charges might increase costs and thereby indirectly affect rates charged by cable companies for cable services (similar to the Seventh Circuit's claim that restrictions on negative option billing might freeze service

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[28] Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided in this section.

offerings and set rates, App. 47), it stated that the plaintiff's argument:

> proves too much . . . . To hold that therefore every cost-imposing state regulation is pre-empted would conflict with the Cable Act's express authorization of state regulation and with the well established rule that even where a Federal statute pre-empts an entire field of regulation, "every state statute that has some indirect effect [on that field] . . . is not preempted."
>
> . . . the Cable Act expressly authorizes state regulation in a whole host of fields that will affect the rates cable companies charge customers for the provision of cable services . . . . In short, the structure of the Cable Act is wholly inconsistent with the claim that Congress intended to pre-empt all state regulations with an affect on the rates cable companies charge for the provision of cable services.

Finneran, *supra* at 101, *citing Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) (Footnoted matter supplied).

The *Finneran* court, at 99, also discussed, in conjunction with the issue whether the state law actually regulated rates, the underlying purpose of the Cable Act. At p. 100, the Court noted that the purpose of the rate preemption section was to allow competition to "control the rates charged by cable companies" and then stated that:

> Downgrade charges, however, insulate cable companies from market forces. . . .the downgrade charge diminished the force of declining demand for premium services in

> the marketplace by limiting the financial benefit to customers from downgrading to a lower level of service.

The same analysis applies in the instant case. The 1992 Cable Act has the same preference for competition[29] and Time Warner's negative billing practices "insulate" it from competition on the services it sells through negative option billing.

Negative option billing practices precluded Time Warner customers from affirmatively deciding whether the newly created "a la carte" channels were wanted. The use of negative option billing minimizes competition for the new channels by diminishing the ability of the cable customer to deselect them and, with the resulting savings, purchase other informational or video services in the marketplace.

II. THE SEVENTH CIRCUIT DECISION PRESENTS IMPORTANT FEDERAL-STATE ISSUES ON THE ISSUE OF PREEMPTION. UNTIL RESOLVED, THE DECISION WILL CAST A PALL ON STATE ENFORCEMENT CASES.

The Seventh Circuit decision significantly expands the right of the FCC, or a court, to preempt state consumer actions as *de facto* rate regulation or under the premise of conflict preemption.

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[29] Congressional notes to 47 U.S.C. § 521(b), *Congressional Findings and Policy:* **Statement of Policy.** (1) Promote the availability to the public of a diversity of views and information through cable television and other video distribution media. (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability.

The Seventh Circuit ruling states, essentially, that any cost imposing or refund action by a state would be subject to FCC preemption. This ruling, if left intact, would cast a pall over any state consumer action against any entity regulated to some degree by the Cable Act. Moreover, the precedential impact of the Seventh Circuit's ruling would not be limited solely to cable television preemption issues but could be used in other cases involving federal rate preemption or administrative "conflict" preemption.

With regard to specific preemption on "rate regulation" matters, this court, in *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2037-2038 (1992) has already established the dichotomy between preemption language on matters "relating to rates" and those concerning the "regulation of rates." The legal issue raised related to the Airline Deregulation Act and the preemptive scope of language within the act which precluded state activities in matters "relating to rates." The court stated, at pp. 2037-38:

> For purposes of the present case the key phrase, obviously, is "relating to". The ordinary meaning of these words is a broad one - . . . and the words thus express a broad preemptive purpose. . . . State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted. . . .

In responding to the States' argument that the pre-emptive language in the Airline Deregulation Act should be read only to limit "the States from actually prescribing rates, routes or services," this Court replied:

> Had the statute been designed to pre-empt state law in such a limited fashion, *it would*

> *have forbidden the States to "regulate rates, routes, and services."* (emphasis supplied).
>
> A common sense view of the word "regulates" would lead to the conclusion that in order to regulate [a matter], a law . . . must be specifically directed toward [it]."[30]

In respect to the Seventh Circuit's apparent reliance on the right of the FCC to enact preemptive regulations in order to achieve harmony in its "rate structure," notwithstanding the strictures of 47. U.S.C. § 552(c)(1), this Court's ruling in *MCI Telecommunications v. American Tel. & Tel.* 114 S. Ct. 2223 (1994) is instructive. In *MCI*, this Court struck down a FCC regulation which exceeded its statutory authority. In that case, as here, the FCC adopted a regulation purportedly pursuant to its rule making powers to make tariff filing optional for certain long distance carriers. 47 U.S.C. § 203(a) required all communication common carriers to file tariffs with the FCC and § 203(b)(2) authorized the Commission to "modify any requirements made by or under . . . this section."

This Court refused to allow the FCC to fundamentally change the requirements of Congress. At p. 2231, it held that the FCC's interpretation of the statute was not entitled to deference because "it goes beyond the meaning that the statute can bear." The same applies here, where (a) Congress has explicitly stated that "nothing" in the Cable Act is to be construed to preempt state consumer actions in the absence of "specific" preemption, (b) the FCC regulation at issue authorizes conduct which has specifically been prohibited by the Congressional ban on billing for services which have not been ordered by name and (c) the FCC's "rate" regulation deals with cable services that are not rate regulated.

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[30] Citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 at 50 (1987).

The procedures utilized by the FCC in the instant case, as ratified by the Seventh Circuit, extend considerably into the critical activity of state consumer protection. They venture well beyond any other court ruling concerning the construction of language preempting a state's regulation of rates.

CONCLUSION

For the reasons above stated, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TIME WARNER CABLE, a division of TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Plaintiff,

v.

JAMES E. DOYLE, in his capacity as Attorney General of the State of Wisconsin, and ALAN T. TRACY, in his capacity as Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection,

Defendants.

OPINION and ORDER

93-C-633-C

Plaintiff, a cable television concern, is seeking to enjoin an administrative enforcement action brought by defendant James E. Doyle on August 31, 1993 before the Wisconsin Department of Agriculture, Trade and Consumer Protection, in which defendant Doyle charged plaintiff with a violation of Wis. Stat. § 100.20 for its practice of charging for a package of "a la carte" channels without obtaining an order requesting these channels by name. Defendant Doyle contended that plaintiff's billing practice constitutes "negative option billing," which is an unfair trade practice prohibited by Wis. Stat. § 100.20. In the enforcement proceeding, which remains pending but has been stayed by agreement of the parties, defendant Doyle seeks to enjoin this practice and to compel plaintiff to disgorge all income received through the alleged negative option billing. Besides pursuing an injunction against the administrative

enforcement proceeding, plaintiff is seeking a declaration that federal law precludes the application of Wis. Stat. § 100.20 to plaintiff's billing practice.

Plaintiff contends that to the extent Wis. Stat. § 100.20 characterizes plaintiff's billing practices as unlawful negative option billing, the state statute is preempted by a Federal Communications Commission regulation on the subject of negative option billing that was promulgated under the 1992 Cable Television Consumer Protection and Competition Act, Pub.L. No. 102-385, 106 Stat. 1460. Plaintiff maintains also that Wisconsin's regulation of negative options constitutes regulation of cable rates, an area declared off-limits to the states by the 1992 Cable Act. Defendants respond that the FCC regulation does not have the effect of preempting the Wisconsin enforcement action and that in any event, the 1992 Cable Act forbids the FCC from preempting state consumer protection laws.[1]

The case is before the court on plaintiff's motion for summary judgment. The parties agree on the material facts and argue only the questions of law, making resolution by summary judgment appropriate. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477

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[1]The Multi-State Cable Task Force has filed an amicus curiae brief in support of defendants' position. The Task Force echoes the arguments advanced by defendants and argues also that because negative option billing laws concern "customer service requirements," Wisconsin's enforcement action is not preempted by federal law. The 1992 Cable Act provides that states may impose customer service requirements that are more stringent than similar requirements imposed by the FCC. 47 U.S.C. § 552(c)(2). The parties address this contention in a footnote skirmish in their briefs. Although it appears to me that negative option laws are not customer service requirements within the meaning of the 1992 Cable Act, I need not address the issue to decide this case.

U.S. 242, 250 (1986). To the extent that the FCC regulation is read as permitting plaintiff's billing practice, I conclude that the regulation conflicts impermissibly with congressional intent as expressed by the statutory language of the Cable Act. I conclude also that Wisconsin's regulation of negative option billing does not constitute cable rate regulation. Because I find that Wisconsin's enforcement action is not preempted by federal law, I will deny plaintiff's motion for summary judgment and enter judgment for defendants, as is permitted where the record reveals that the non-moving party is entitled to judgment. *Mason v. Melendez*, 525 F.Supp. 270, 287 (W.D. Wis. 1981); *see Tripp v. May*, 189 F.2d 198, 200 (7th Cir. 1951).

FACTS

Plaintiff Time Warner Cable is the division of Time Warner Entertainment Company, L.P., that operates cable television systems. Plaintiff's principal place of business is Stamford, Connecticut. Defendant James E. Doyle is the Attorney General of the State of Wisconsin and defendant Alan T. Tracy is the Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection.

Plaintiff operates cable systems in several Wisconsin communities, including Milwaukee, Brookfield, and Plymouth-Dacada. It offers both basic and standard tiers of service in these three communities. "Basic" and "standard" refer to two "tiers" or levels of service offered by cable operators to their subscribers. To subscribe, a customer must order the first level of service offered in the "basic" tier. Subscribing to the second or "standard" tier is optional, but the great majority of subscribers order the standard tier in addition to the basic one.

Milwaukee has approximately 96,000 subscribers and Brookfield and Plymouth-Dacada each have

approximately 6,000 subscribers. All three cable systems are managed by plaintiff's Milwaukee Division.

After the Cable Television Consumer Protection and Competition Act of 1992 was passed, plaintiff concluded that in order to comply with the act and the accompanying FCC regulations, it would have to restructure its service offerings to subscribers in Milwaukee, Brookfield, and Plymouth-Dacada as of September 1, 1993. As part of its restructuring, plaintiff removed certain channels from its basic and standard tiers and offered those channels on a per channel or "a la carte" basis. This practice is known in the trade as "unbundling." A la carte channels can be added or dropped by subscribers on an individual basis; they are also available in a discounted package.

In Milwaukee, Brookfield, and Plymouth-Dacada, Time Warner removed two channels, WTBS and WGN, from the basic tier. In Milwaukee and Brookfield, Time Warner removed the Discovery Channel from the standard tier. In addition, Time Warner removed E! Entertainment Television from the standard tier in Milwaukee. In Milwaukee, the removed channels were offered a la carte for $.79 a month each or as a package for $2.20 a month. In Brookfield, the removed channels were offered a la carte for $.46 a month each or as a package for $1.28 a month. In Plymouth-Dacada, the a la carte rate for the removed channels was $.76 a month each or $1.06 as a package.

The restructuring went into effect on September 1, 1993. Plaintiff billed subscribers in all three communities for the package of a la carte services. In each community, the combined price of the basic tier plus the standard tier decreased by the amount charged for the a la carte package so that after September 1, 1993, subscribers continued to

receive the same number of channels that they had received before September 1, 1993 for the same price.[2]

From August 30, 1993 through October 1993, plaintiff's Milwaukee Division notified subscribers that certain channels were now available a la carte and could be purchased separately or in a package or cancelled. The Milwaukee Division sent subscribers a letter, and in addition, it broadcast informational programming about the billing change, posted a notice in its billing department in Milwaukee, printed notices on its September and October billing invoices and enclosed explanatory inserts with its September and October bills.

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[2]Before September 1, 1993, a standard service subscriber in Milwaukee paid $24.10 a month for 51 channels. At that time, a standard service subscriber in Brookfield paid $21.25 a month for 49 channels and a standard service subscriber in Plymouth-Dacada paid $22.00 a month for 40 channels.

As of September 1, 1993, the price of basic service in Milwaukee was increased to $11.65 a month and the price of the standard tier was decreased to $10.25 a month. Because the a la carte package cost $2.20 a month, a standard service subscriber in Milwaukee who did not cancel the a la carte package continued to receive 51 channels for $24.10 a month.

As of September 1, 1993, the price of basic service in Brookfield was decreased to $9.52 a month and the price of the standard tier was decreased to $10.40 a month. Because the a la carte package cost $1.28 a month, a standard service subscriber in Brookfield who did not cancel the a la carte package continued to receive 49 channels for $21.20 a month.

As of September 1, 1993, the price of basic service in Plymouth-Dacada was increased to $10.47 a month and the price of the standard tier was decreased to $10.47 a month. Because the a la carte package cost $1.06 a month, a standard service subscriber in Plymouth-Dacada who did not cancel the a la carte package continued to receive 40 channels for $22.00 a month.

Subscribers in Milwaukee, Brookfield, and Plymouth-Dacada can cancel a la carte services by calling the Milwaukee Division's customer service office. The accounts of subscribers who cancel the services are credited retroactively to September 1, 1993. New cable subscribers are advised when they order cable service that the a la carte services are optional and they do not receive the a la carte channels unless they affirmatively order them.

On or about September 1, 1993, plaintiff removed three channels from existing cable service tiers in Merrill, Wisconsin, and began to provide them as a la carte channels. Merrill subscribers received the three channels free of charge for the month of September and were encouraged to return a pre-paid post card, provided with their September billing invoice, informing plaintiff which of the a la carte channels they wished to continue to receive. After September, subscribers in the Merrill area received and paid for only those a la carte services they had requested by name on the post card.

OPINION

The 1992 Cable Act prohibits negative option billing, 47 U.S.C. § 543(f), and empowers the Federal Communications Commission to establish regulations to prevent cable operators from evading the prohibition. *See* 47 U.S.C. § 543(h). Plaintiff contends that the FCC's authority to regulate negative option billing derives from other subsections of the 1992 Cable Act as well and from 47 U.S.C. § 303(r). Subsection 303(r) gives the commission broad rulemaking power to carry out the provisions of the chapter established by the 1934 Communications Act of which the Cable Act is a part. Although there is room for doubt that § 303(r) continues to grant this broad authority after the enactment of the 1984 amendments to the Communications Act, the United States Supreme Court has suggested in dicta that it does. *See City of New York v. FCC*, 486 U.S. 57, 70 n. 6 (1988). However, to resolve

the issue before the court, I need not determine whether the FCC has authority to promulgate regulations implementing 47 U.S.C. § 543(f).

The 1992 Cable Act defines negative option billing as the practice of charging a cable subscriber for any service that the subscriber has not "affirmatively requested by name." 47 U.S.C. § 543(f). Determining whether the FCC regulation promulgated to implement this section preempts Wisconsin's enforcement action requires answering two questions: whether the FCC intended to preempt Wisconsin law concerning negative option billing and whether the preemptive action is within the scope of the authority delegated the FCC by Congress. *See Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1981). Valid agency regulations "have no less preemptive effect than federal statutes." *Id.* at 153-54.

Federal law has preemptive effect when Congress has expressed its intent to preempt state law, or when "it is clear ... that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation" without leaving room for state law on the subject. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (*citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Conceding that the 1992 Cable Act leaves the states a role in regulating the cable industry, plaintiff does not contend that Congress has occupied the field of cable regulation in the act. A third type of preemption, "conflict preemption," *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992), occurs "when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." *Crisp*, 467 U.S. at 699.

The United States Supreme Court has held that when a federal agency leaves an option open to a regulated industry in order to promote a policy authorized by Congress, a state that limits the availability of that option has created an obstacle to effecting congressional objectives. *De la Cuesta*, 458 U.S. at 156. It is plaintiff's contention that this variety of conflict preemption is present in this case and that Congress made explicit its intent to preempt state regulation of negative option billing when it decided that the states could not regulate cable rates under the act.

The FCC regulation at issue provides that

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. This provision, however, shall not preclude [1] the addition or deletion of a specific program from a service offering, [2] the addition or deletion of specific channels from an existing tier of service, or [3] the restructuring or division of tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent with applicable regulations.

47 C.F.R. § 76.981.

Plaintiff's view of this regulation is that it represents a policy choice by the FCC to promote unbundling by decreasing the likelihood that subscribers will reject the newly optional a la carte offerings previously available only as part of a tier. If Wisconsin is permitted to enforce its negative option billing prohibition against plaintiff's practice in the Milwaukee area, plaintiff contends, the effect will be to decrease the inducement to unbundle that the FCC chose to provide and to create the kind of obstacle to effecting congressional objectives that

the Supreme Court condemned in *De la Cuesta*. Plaintiff reads the regulation as permitting plaintiff to restructure without causing a fundamental change by taking the sort of action plaintiff took in Milwaukee, that is, removing four channels out of fifty-one from their original tiers and continuing to offer them on an optional basis without raising the total cost of cable service. For support, plaintiff cites passages from FCC reports generated during the rulemaking proceedings. *See, e.g., In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992--Rate Regulation*, MM-Docket 92-266, FCC 93-177, Report and Order and Further Notice of Proposed Rulemaking (adopted April 1, 1993; released May 3, 1993) ¶ 441; *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992--Rate Regulation*, MM-Docket 92-266, FCC 93-428, First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking (adopted and released Aug. 27, 1993) ¶ 86 n. 127.

Defendants' view of the regulation and the FCC reports is quite different. Defendants assert that the regulation does not authorize plaintiff's billing practice; for this reason, there is no conflict between the federal and the Wisconsin prohibition of negative option billing and thus no conflict preemption. Defendants maintain that if plaintiff's interpretation of the FCC regulation is accurate, then the regulation is inconsistent with the language of the statute prohibiting negative options. Because I am persuaded that defendants are correct on this score, I need not choose between the parties' interpretations of the FCC's intent as it relates to plaintiff's billing practices. Instead, I hold that if plaintiff has interpreted the FCC regulation correctly, the FCC has acted outside its delegated authority in promulgating the regulation.

Although federal regulators implementing a statute are entitled to great deference, *Chevron United States, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

842-43 (1984), a regulation may not stand if it is inconsistent with the language of the statute. *Illinois E.P.A. v. United States E.P.A.*, 947 F.2d 283 (7th Cir. 1991) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). "If Congress has clearly spoken on the issue in question, our inquiry is at an end for 'that intention is the law and must be given effect.'" *Id.* (quoting *Chevron*, 467 U.S. at 843 n. 9).

The 1992 Cable Act provides:

> Negative option billing prohibited. A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

47 U.S.C. § 543(f) (second emphasis added). Although the parties dispute whether the a la carte offerings are "service tiers," they appear to agree that they are "services" within the meaning of 47 U.S.C. § 543(f), noting that the legislative history indicates that the negative option billing prohibition was intended to apply to individually-priced single channels, packages, and tiers. H.R.Conf.Rep. No. 862, 102d Cong., 2d Sess. 65, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1247. Defendants emphasize that plaintiff billed its subscribers for a la carte offerings (channels WTBS, WGN, E!, and Discovery, offered separately or in a "premium package") even though the subscribers had not requested any of these offerings by their names. Defendants maintain that in so doing, plaintiff violated the statute.

Plaintiff replies as follows: its reading of the FCC regulation is consistent with the statute as shown by the FCC's statement that "restructuring of tiers and equipment

... will not bring the negative option billing provision into play if subscribers will continue to receive the same number of channels and the same equipment[; a] subscriber presumably has already 'affirmatively requested' this level of service," Report and Order ¶ 441; under the FCC regulation, plaintiff's a la carte channels have been "affirmatively requested" in compliance with the statute because at the time the a la carte channels were unbundled, plaintiff's customers had requested the service tier from which the a la carte channels were removed; and the FCC has determined that a subscriber who chooses a service tier with, for example, twenty channels, has requested twenty channels regardless whether those channels remain in a tier or are separated out into a la carte offerings.

If plaintiff's assessment of the FCC action is correct, the FCC has made a determination foreclosed to it by Congress. Under plaintiff's interpretation, the regulatory negative option prohibition would permit a cable operator to charge for a service that at one time was part of a tier the customer requested by name but was not requested by name itself. The express language of the statutory negative option prohibition requires a cable operator to obtain a request for a given service by name before the operator may charge for that service. It appears that the FCC would be permitted to construe 47 U.S.C. § 543(f) in a manner consistent with plaintiff's interpretation had Congress not specified that an "affirmative request" must be "by name." Because Congress did so specify, the FCC is not free to ignore the "by name" requirement.

It is a well-established rule of statutory interpretation that every phrase in a statute be given meaning, *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1516 (7th Cir. 1993), cert. denied, 114 S.Ct. 688 (1994), unless a literal interpretation "would lead to absurd results or would thwart the obvious purposes of the statute." *NuPulse, Inc. v. Schlueter Co.*, 853 F.2d 545, 549 (7th Cir.

1988) (quoting *Smith v. Bowen*, 815 F.2d 1152, 1154 (7th Cir. 1987)). In arguing that the FCC chose to regulate negative options less strictly in order to promote unbundling more strongly, plaintiff concedes implicitly that the FCC could have chosen a more restrictive interpretation of "negative option billing"; accordingly, plaintiff cannot contend that giving "by name" its plain meaning would be absurd or contrary to congressional intent.

To the extent that plaintiff has assessed the FCC's regulation correctly as permitting the billing practice at issue, the regulation is invalid as contrary to congressional intent. *See Chevron*, 467 U.S. at 843 n. 9. Because Wisconsin's regulation of negative option billing does not conflict with a valid federal regulation, plaintiff cannot argue that the state is precluded from prohibiting negative option billing because such a prohibition would conflict with the 1992 act by obstructing the act's implementation.

Plaintiff raises another contention: that if the FCC did not intend to preempt all state regulation of negative option billing, it stated its intention to preempt the states from enacting or enforcing their own prohibitions against negative option billing except as the state prohibitions relate to basic services. Plaintiff quotes the following footnote from the FCC Report and Order:

> Some municipalities argue that state and local governments should have concurrent enforcement powers over negative option billing practices. Austin Comments at 71-72. We do not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services and equipment and consistent with the implementing rules we adopt and their powers under state law to impose penalties.

Report and Order, ¶ 439 n. 1095. Although plaintiff does not argue that Congress intended to allow the FCC to "occupy the field" of negative option billing regulation, plaintiff treats this statement by the FCC as an assertion that the FCC intended to occupy this field outside the context of basic services.

Defendants ignore this statement by the FCC. However, they argue that through 47 U.S.C. § 552(c)(1), Congress has denied the FCC the power to promulgate regulations that preempt state law unless the state law is "specifically preempted" by the language of the statute itself.

47 U.S.C. § 552(c)(1) provides as follows:

Consumer protection laws

> Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter.

According to defendants, this section should be read to mean "nothing in the language of the statute itself shall be construed by the FCC or anyone else to preempt a state enforcement action unless the state enforcement action is specifically preempted by the language of the statute itself." Plaintiff responds that defendants misinterpret § 552(c)(1) and argues that § 552(c)(1) does not constitute a restraint on the FCC's power because "in this subchapter" should be interpreted to encompass both the statute itself and the regulations promulgated under the statute.

Under plaintiff's reading of § 552(c)(1), interested parties (presumably courts and potential litigants) may not construe the statute or FCC regulations to preempt

Wisconsin's enforcement action unless either the statute or a regulation specifically preempts the state enforcement action. Even under this reading, there is no force to an FCC assertion that it has occupied the field of negative option prohibitions that do not concern basic services. Plaintiff does not argue that the sections of the statute itself that deal most explicitly with negative option billing, 47 U.S.C. §§ 543(f) and 543(h), "specifically preempt" Wisconsin's enforcement action.[3] Even if § 552(c)(1) permits an FCC regulation to preempt state law, the single regulation on negative option billing promulgated by the FCC contains nothing that can be said to preempt Wisconsin's enforcement action specifically. Although the precise meaning of the phrase "specifically preempted" is unclear, I am convinced that a regulation that merely restates part of the Cable Act's statutory prohibition of negative option billing and lists three practices to be excluded from the prohibition does not specifically preempt Wisconsin's ability to enforce its own law against plaintiff.

Plaintiff's last theory is that the 1992 Cable Act specifically preempts Wisconsin's enforcement action by prohibiting states from regulating cable rates for programming offered on a per channel basis.[4] *See* 47 U.S.C. §§ 543(a)(1), 543(a)(2)(B), 543(l)(2)(B). Plaintiff argues that by prohibiting plaintiff from charging for

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[3]I will address below plaintiff's contention that the rate regulation provisions of the 1992 Cable Act, *e.g.*, 47 U.S.C. § 543(a), specifically preempt Wisconsin's regulation of negative option billing.

[4]Under the Cable Act, rates for basic service are set by local franchising authorities, and in some cases the FCC itself, in accordance with FCC regulations. 47 U.S.C. § 543(a)(2)(A). Rates for other tiers of service are regulated by the FCC. 47 U.S.C. §§ 543(a)(2)(B), 543(l)(2)(B). Rates for programming sold on a per channel or per program basis are not subject to regulation. 47 U.S.C. § 543(a)(1), 543(l)(2)(B).

a la carte channels that its customers have not ordered by name, Wisconsin is establishing a rate of zero for those a la carte channels.

Defendants do not dispute that Wisconsin is precluded from regulating cable rates. They maintain, however, that Wisconsin is not regulating rates for the a la carte services when it prohibits negative option billing because the state is not dictating the amount that plaintiff may charge consumers. Even if Wisconsin's negative option prohibition could affect cable rates, cases decided under the Cable Communications Policy Act of 1984 establish that a statute that preempts state "regulation of rates" does not preempt state regulation of matters that may affect cable rates indirectly. *Cable Television Ass'n v. Finneran*, 954 F.2d 91 (2d Cir. 1992); *cf. Storer Cable Communications v. City of Montgomery*, 806 F.Supp. 1518 (M.D. Ala. 1992); *Comcast Cablevision of Sterling Heights, Inc. v. Sterling Heights*, 443 N.W.2d 440 (1989).

Defendants' enforcement action will not affect rates for the provision of cable services *directly* by setting them at zero. Defendant Doyle's prayer for relief in the administrative proceeding requests (1) an injunction of plaintiff's practice of billing for a la carte channels without obtaining an order for those channels by their names and (2) an order compelling plaintiff to disgorge the funds it has collected pursuant to its practice. The injunction would have the effect of setting plaintiff's a la carte channel rates at zero in the future only if plaintiff continued to provide those channels free of charge to those subscribers who did not place affirmative orders for the channels. This possibility is unlikely at best.[5] Courts are to acknowledge the real world context of the cases before

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[5]This assessment is borne out by plaintiff's practice in Merrill, Wisconsin, where only customers who placed an affirmative order for a la carte channels continued to receive those channels.

them even when the often technical process of construing a statute is at issue. *Cf. Sundstrand Corp. v. Commissioner of Internal Revenue*, 17 F.3d 965, 967-68 (7th Cir. 1994).

Compelling plaintiff to disgorge funds already collected is slightly more problematic.[6] The argument can be made that if defendant Tracy requires plaintiff to give up all the money it charged for the a la carte channels in the past, he will be setting plaintiff's rate for the a la carte channels at zero retroactively to September 1, 1993, until plaintiff complies with the accompanying injunction. The problem with this argument is that it exalts form over substance. Defendants could avoid this objection if instead of seeking disgorgement, they requested and imposed a fine equal to the amount collected by plaintiff from the recipients of a la carte services. Of course, it is possible that plaintiff would pass along to consumers the expense it incurred in paying the fine, but this possibility has never been held to prevent states from fining or otherwise imposing costs on cable operators. Congress has given express authorization to the enactment and enforcement of state consumer protection laws that have not been specifically preempted, 47 U.S.C. § 553(c)(1), as well as to the imposition of customer service requirements that exceed those set by the FCC, 47 U.S.C. § 553(c)(2).

To bolster its argument that Congress intended to preempt state negative option regulation by classifying negative option regulation as a form of rate regulation, plaintiff notes that (1) the statutory prohibition of negative option billing, 47 U.S.C. § 543(f), is included in the section entitled "Regulation of Rates," 47 U.S.C. § 543; and (2) that the FCC dealt with negative option billing in the course of its rate regulation rulemaking proceeding, *see*, *e.g.*, Report

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[6]I note defendants' statement in one of their briefs that defendant Doyle has drafted a stipulation dropping the request for disgorgement from his prayer for relief.

and Order ¶¶ 433-42. Although such congressional and agency actions may be relevant to ascertaining congressional intent, *see Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1039 (D.C. Cir. 1986), in this instance they may demonstrate nothing more than that Congress recognized that disputes over alleged negative option billing practices would arise in connection with rate regulation-induced restructuring. In any event, these possible indications of congressional intent, such as they are, are not strong enough to overcome the presumption against preemption. *See Rice*, 331 U.S. at 230 ("historic police powers of the States [are] not to be superseded ... unless that was the clear and manifest purpose of Congress").

I conclude that Wisconsin's prohibition of negative option billing does not conflict with an FCC regulation because the regulation is invalid to the extent that it authorizes the billing practice challenged by defendant Doyle. I conclude also that the federal statutory and regulatory provisions dealing with negative option billing do not "specifically preempt" Wisconsin's negative option billing law in any other way. Furthermore, Congress's bar of state regulation of cable rates does not have preemptive effect in this case because Wisconsin's regulation of negative option billing does not constitute regulation of cable rates. Accordingly, I will deny plaintiff's motion for summary judgment and I will enter judgment for defendants.

ORDER

IT IS ORDERED that the motion of plaintiff Time Warner Cable for summary judgment is DENIED. The clerk of court is ordered to enter judgment for defendants James E. Doyle and Alan T. Tracy and to close this case.

Entered this 17th day of March, 1994.

BY THE COURT

/s/
BARBARA B. CRABB
District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1894

TIME WARNER CABLE, a division of
TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Plaintiff-Appellant,

v.

JAMES E. DOYLE, in his capacity as Attorney
General of the State of Wisconsin, and
ALAN T. TRACY, in his capacity as Secretary
of the Wisconsin Department of Agriculture,
Trade and Consumer Protection,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 93-C-633 -- Barbara B. Crabb, *Chief Judge*

Argued September 22, 1994*
Decided September 25, 1995

Before FERGUSON,** RIPPLE and ROVNER, *Circuit Judges*.

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* Following oral argument, the court invited the Federal Communications Commission to submit an amicus brief outlining the Commission's position on the issues presented for decision.

** The Honorable Warren J. Ferguson of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

RIPPLE, *Circuit Judge*. In this appeal, we are asked to determine whether the State of Wisconsin's prohibition of certain negative option billing practices of Time Warner Cable ("Time Warner") is preempted by the federal regulatory scheme. The district court entered judgment in favor of the State. It held that the applicable state statute, Wis. Stat. § 100.20, was not preempted by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 47 U.S.C. §§ 521-559, and that it would contravene the congressional intent to read FCC regulation 47 C.F.R. § 76.981 as authorizing Time Warner's disputed billing practices. For the reasons that follow, we reverse the judgment of the district court.

I
BACKGROUND

A. *Facts*

Time Warner Cable, a division of Time Warner Entertainment Company, operates cable television systems in several Wisconsin communities. Prior to September 1, 1993, Time Warner offered its Wisconsin subscribers two types of programming packages, or "tiers." Every subscriber received the "basic" tier. This tier included local network affiliates, a public broadcasting channel, and two "superstation" channels: Chicago-based WGN and Atlanta-based WTBS. Most subscribers also purchased the "standard" tier. Programming offered on this tier included MTV, CNN, ESPN, the USA Network, and the Discovery Channel. Various movie channels could be added for additional fees.

Pursuant to section 3 of the 1992 Cable Act, 47 U.S.C. § 543, the Federal Communications Commission ("FCC" or "Commission") promulgated various cable rate regulations that became effective September 1, 1993. In response to these regulations, Time Warner restructured its service tiers. As of September 1, 1993, Time Warner

"unbundled," or removed, WTBS and WGN from its basic tier. In Milwaukee, the company also removed the Discovery Channel and E! Entertainment Television from its standard tier.[1] Time Warner then began offering the deleted channels on an "a la carte," or per-channel basis. Milwaukee subscribers were offered the four removed channels for $0.79 a month each, or as a package for $2.20 per month.

Time Warner continued to provide the a la carte package to its existing customers. Thus, subscribers received the same number of channels that they had received previously. Time Warner also began charging its existing customers the additional monthly fee for the a la carte package. However, subscribers who had been purchasing both the basic and standard tiers noticed no increase in their monthly bills. Time Warner maintained the pre-September 1, 1993 cost of service by altering the price of its basic and standard tier packages. In Milwaukee, for example, Time Warner raised the price of the basic tier from $10.45 to $11.65 per month and reduced the price of the standard tier from $13.65 to $10.25 per month. Existing subscribers therefore paid $24.10 per month for the basic, standard, and a la carte services ($11.65 + $10.25 + $2.20), just as they previously had paid $24.10 per month ($10.45 + $13.65) for the basic and

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[1]The state administrative action discussed in the text also concerns Time Warner's billing practices in the Brookfield and Plymouth-Dacada communities. Time Warner offered fewer total channels in these communities and charged slightly less per month for its services than it charged Milwaukee subscribers. In addition, Time Warner did not remove the same number of channels in each community. Nevertheless, Time Warner engaged in the same alleged unfair trade practice in all three areas by charging customers for a la carte channels even though they had not specifically requested them. To simplify the factual discussion, we have focused upon Time Warner's service restructuring in Milwaukee.

standard tier services. Thus, following Time Warner's programming restructuring, customers who had been subscribing to both the basic and standard tier packages found themselves paying the same amount per month for the same number of channels. Only the format of the services for which they were paying had changed.

Time Warner notified its existing customers that it had altered the basic and standard tier packages and had created the new a la carte channels. Subscribers were informed that they could cancel the a la carte package at any time. However, Time Warner continued to provide the a la carte package to its existing customers, and continued charging them for this now-separate package, unless they called to cancel. New subscribers did not receive the a la carte channels unless they specifically ordered them.

The State of Wisconsin became concerned about Time Warner's a la carte billing policy. The State believed that, as it related to existing customers, the policy constituted "negative option billing," a practice whereby a company places a charge for an unordered service on customers' bills and requires those who do not want the service affirmatively to reject the charge. Acting through its attorney general, the State brought an enforcement action against Time Warner before the Wisconsin Department of Agriculture, Trade & Consumer Protection. The State contended that Time Warner's method of charging existing customers for the a la carte channels constituted an unfair trade practice in violation of Wis. Stat. § 100.20.[2] The State sought an injunction

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[2]The Wisconsin statute provides, in pertinent part:

> (1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

(continued...)

prohibiting Time Warner from charging for an a la carte channel unless the customer specifically requested it. It also sought an order requiring Time Warner to disgorge the income it had earned through the alleged unfair trade practice. Time Warner responded by filing suit in the district court. It sought to enjoin the state administrative proceeding. The parties agreed to stay the state administrative proceeding pending resolution of Time Warner's suit.

B. *District Court Proceedings*

The district court denied Time Warner's motion for summary judgment and entered judgment in favor of the State. *Time Warner Cable v. Doyle*, 847 F.Supp. 635 (W.D. Wis. 1994). In sum, the district court concluded that, to the extent that the FCC regulation could be read as permitting Time Warner's billing practices, the regulation

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[2](...continued)

> (2) The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.
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> * * *
>
> (4) The department of justice may file a written complaint with the department alleging that the person named is employing unfair methods of competition in business or unfair trade practices in business or both.... [A] representative of the department of justice designated by the attorney general may appear before the department in such proceedings.

Wis. Stat. § 100.20.

was in conflict with the statutory language of the 1992 Cable Act. The court further concluded that Wisconsin's regulation of negative option billing did not constitute cable rate regulation. In the following paragraphs, we shall describe the district court's reasoning in more detail.

At the outset, the district court turned to the language of the 1992 Cable Act and observed that it prohibits negative option billing. The pertinent section provides:

> (f) Negative Option Billing Prohibited.--A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

47 U.S.C. § 543(f). It also noted that the Commission had promulgated a negative option billing regulation, 47 C.F.R. § 76.981, that generally proscribed negative option billing, but carved out an exception in cases involving "the addition or deletion of specific channels from an existing tier of service." At the time of the district court's decision, the regulation stated:

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. This provision, however, shall not preclude the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent

> with applicable regulations. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

47 C.F.R. § 76.981 (1993).[3]

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[3]The FCC subsequently modified the regulation as follows:

> (a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.
>
> (b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.
>
> (c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraphs (a) or (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. § 543.

47 C.F.R. § 76.981 (1994).

Time Warner argued that its billing activity fell within the regulatory exception and that, consequently, the FCC's regulation preempted Wisconsin's regulation of the same activity under its unfair trade practices statute. In Time Warner's view, the federal regulation permitted the billing practice as a permissible option and therefore state law that forbade the practice was preempted because it conflicted with the federal scheme. The State's response was two-pronged. It submitted that the federal regulation did not authorize Time Warner's billing practice. In the alternative, it contended that, if the federal regulation did authorize the billing practice, the regulation could not be squared with the language of the federal statute and therefore was invalid.

The district court assumed that Time Warner had interpreted correctly the Commission's regulation. It therefore proceeded on the assumption that the federal regulation permitted Time Warner's billing practice. Nevertheless, the court agreed with the State that such a reading of the federal regulation was entitled to no deference because it contravened congressional intent. The district court pointed out that the negative option billing provision of the 1992 Cable Act forbade cable operators from charging subscribers for services they had not "affirmatively requested by name." In the district court's view, this language precluded the FCC from allowing Time Warner to charge existing subscribers for the a la carte channels without first obtaining their permission. Although the a la carte channels had once been part of service tiers that these subscribers had "affirmatively requested," the district court reasoned that the subscribers had never "affirmatively requested" these channels "by name." Because the Wisconsin prohibition against negative option billing did not interfere with a valid federal

regulation, concluded the district court, the State was not precluded from enforcing its proscription.[4]

The district court also rejected Time Warner's claim that Wis. Stat. § 100.20 was preempted because it served to regulate cable rates. The 1992 Cable Act generally prohibits states from regulating cable rates. *See* 47 U.S.C.

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[4]The district court also addressed Time Warner's contention that, even if the FCC did not intend to preempt all state regulation of negative option billing practices, it did intend to permit state regulation only with respect to basic service. Time Warner had argued that the FCC's Report and Order, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order, and Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631, 5905 n. 1095 (adopted Apr. 1, 1993, released May 3, 1993), had noted:

> We do not preclude state and local governments from adopting rules or taking enforcement action relating to basic services and equipment[.]

The State had replied that another provision of the 1992 Cable Act, 47 U.S.C. § 552(c)(1), specifically allowed the state to enforce its consumer protection law "to the extent not specifically prohibited by" the Cable Act. Time Warner's rejoinder was that § 552(c)(1) had to be construed to include the FCC's regulations. The district court rejected the argument on the ground that the FCC's negative billing option regulation set out above could not be considered a specific preemption of the State's consumer protection laws.

§ 543(a)(1).[5] Time Warner argued that Wisconsin's enforcement action would violate this prohibition by establishing a rate of "zero" for the a la carte package. The district court rejected this claim on the ground that Wisconsin's enforcement action would have only an indirect effect on Time Warner's rates. The court noted, but did not hold, that it might be problematic to require Time Warner to disgorge the funds it had earned under the disputed billing practice. The court suggested that the State could avoid this issue by simply fining Time Warner.

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[5]Section 543(a) provides, in relevant part:

> **Competition preference; local and Federal Regulation**
>
> **(1) In general**
>
> No Federal agency or State may regulate the rates for the provision of cable service to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.
>
> **(2) Preference for competition**
>
> If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority[.]

47 U.S.C. § 543(a).

Subsequently, the State agreed not to seek a disgorgement order against Time Warner; in return, Time Warner agreed to market affirmatively its a la carte channels to its existing customers.

II
DISCUSSION

We review the district court's decision to deny Time Warner's motion for summary judgment de novo. *Butler v. Encyclopedia Brittanica, Inc.*, 41 F.3d 285, 288 (7th Cir. 1994).[6]

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[6]Although Time Warner seeks to enjoin a state administrative enforcement action, there is no cause for abstention under *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny. Wisconsin has agreed to stay its state administrative proceedings pending our resolution of the preemption issue, and has not argued for abstention. *See Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977) (holding that states may waive *Younger* abstention argument); *see also Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2036 n. 1 (1992) ("Petitioner [attorney general of Texas] has not argued for abstention, and the federal-state comity considerations underlying *Younger* are accordingly not implicated."); *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union, Local 54*, 468 U.S. 491, 500 n. 9 (1984) ("Since the State's Attorney General has ... agreed to our adjudication of the controversy, considerations of comity are not implicated, and we need not address the merits of the *Younger* abstention claim."); *cf. Nelson v. Murphy*, 44 F.3d 497, 501 (7th Cir. 1995) ("The principle of *Younger* is that a party to a state proceeding affecting important governmental interests must resolve the dispute in the state's preferred tribunal."), *petition for cert. filed*, (U.S. June 8, 1995) (No. 94-2053).

Similarly, there is no cause for abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). A court should abstain, under *Burford*, from interfering with the proceedings of a state administrative agency if (1) there are "difficult questions of state

(continued...)

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[6](...continued)
law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or (2) if the "exercise of federal review ... would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *See New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 361 (1989) ("NOPSI"); *Nelson*, 44 F.3d at 500-01 (same); *see also General Ry. Signal Co. v. Corcoran*, 921 F.2d 700, 709 (7th Cir. 1991) (stating that *Burford* analysis should consider (1) whether suit is based on cause of action that is exclusively federal; (2) whether difficult or unusual state laws are at issue; (3) whether there is a need for coherent state doctrine in the area; (4) whether state procedures indicate a desire to create special state forums to adjudicate the issues presented). Time Warner's claim does not involve difficult or complex issues of state law. Moreover, although our decision may prevent Wisconsin from enforcing its unfair trade practices law in this particular dispute, "*Burford* ... does not require abstention whenever there exists such a [complex administrative] process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *NOPSI*, 491 U.S. at 362 (quotation and citation omitted). Indeed, "there is ... no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.* at 363 (quotation and citation omitted). Finally, as our colleagues in the Fourth Circuit recently noted in a case concerning the preemptive effect of an FCC regulation, "several circuit courts have emphasized that *Burford* abstention is particularly inappropriate when preemption issues are present." *Neufeld v. City of Baltimore*, 964 F.2d 347, 350 (4th Cir. 1992) (collecting cases); *see also Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1115-16 (3d Cir. 1986) (discussing the issue and noting agreement with decisions collected in *Neufeld*). *But cf. Aluminum Co. of Am. v. Utils. Comm'n*, 713 F.2d 1024, 1029-30 (4th Cir. 1983) (suggesting that abstention may be appropriate in preemption cases where detailed fact finding is required), *cert. denied*, 465 U.S. 1052 (1984); *General Ry. Sig. Co.*, 921 F.2d at 708 (noting that *Burford* inquiry is fact intensive). The appellate record in this case makes clear that no such fact finding is required here.

A.

We preface our analysis with a brief review of the principles governing preemption. The Supremacy Clause of our Constitution provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to this authority, the Congress, in the exercise of the legislative authority granted to it by the Constitution, may preempt state law. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). In determining whether the Congress has preempted state law, our task is to discern congressional intent. *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2036 (1992). Preemption "will not lie unless it is 'the clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732, 1737 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Indeed, the Supreme Court has instructed us to be reluctant in finding federal preemption of a subject "traditionally governed by state law." *Id.*

Evidence of preemptive purpose "is sought in the text and structure of the statute at issue." *Id.* "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Id.* However, "[p]re-emption ... is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152-53 (1982) (quotations and citation omitted). The Court has indicated that preemption may occur when:

> Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state

> law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Comm'n, 476 U.S. at 368-69 (citations omitted); *see also De La Cuesta*, 458 U.S. at 152-53. In sum, preemption may arise through an express congressional statement defining the preemptive reach of a statute ("express preemption"), implicitly, when Congress manifests its intent to occupy an entire field of regulation ("field preemption"), or through conflict between state and federal law, when it either is impossible to comply with both, or when state law stands as an obstacle to the accomplishment of the full congressional objectives ("conflict preemption"). *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992).[7]

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[7]In *American Agriculture Movement, Inc.*, we cited the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), for the proposition that we may resort to analysis under field and conflict preemption "[o]nly if a statute is devoid of explicit preemptive language." *See* 977 F.2d at 1154 (citing plurality opinion and opinion of Blackmun, J., concurring in relevant part). Recently, however, the Supreme Court has stated that *Cipollone* does not stand for this blanket proposition. *See Freightliner Corp. v. Myrick*, 115 S.Ct. 1483, 1487-88 (1995). The Court noted that, although the inclusion of an express definition of the preemptive effect of the statute supports a reasonable inference that the Congress did not intend to preempt other matters, the existence of that inference does not foreclose all possibility of implied preemption. The Court noted that *Cipollone* itself conducted "a conflict pre-emption analysis" even though the statute at issue contained an express preemption provision. *Freightliner Corp.*, 115 S.Ct. at 1488. The Court

(continued...)

Preemption also may occur through the promulgation of federal regulations. *See De La Cuesta*, 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes."). As Justice White, writing for the Court in *City of New York v. FCC*, noted, the phrase "Laws of the United States" in the Supremacy Clause "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." 486 U.S. 57, 63 (1988); *see also Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 988 F.2d 1480, 1485 (7th Cir. 1993) (same). Accordingly, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369. As Justice White explained in *City of New York*:

> The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to preempt represents a reasonable accommodation of conflicting policies that were committed to the

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[7](...continued)
further noted that "[o]ur subsequent decisions have not read *Cipollone* to obviate the need for analysis of an individual statute's pre-emptive effects." 115 S.Ct. at 1488 (citations omitted). Thus, the Court concluded, "[a]t best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." 115 S.Ct. at 1488.

> agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

486 U.S. at 64 (internal citations, quotations and citations omitted). The Supreme Court has cautioned that, in analyzing the preemptive effect of an agency regulation, "a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' "for" '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *Id.* (quoting *De La Cuesta*, 458 U.S. at 154. Rather, courts should inquire whether the agency intended to preempt state law, and, if so, whether the agency possessed the power to do so. *De La Cuesta*, 458 U.S. at 154; *see also City of New York*, 486 U.S. at 64.

B.

1.

Having set forth the basic principles that govern preemption, we begin our analysis at the same point as that chosen by the district court. We must consider whether the negative option billing regulation of the FCC is compatible with the provisions of the 1992 Cable Act.

As we have noted above, the Cable Act prohibits cable operators from charging a subscriber "for any service or equipment that the subscriber has not affirmatively requested by name." 47 U.S.C. § 543(f). The FCC's negative option billing regulation reiterates this general prohibition. *See* 47 C.F.R. § 76.981 (1993). However, it also provides that this general prohibition does not apply to the

> addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the

> restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent with applicable regulations.

Id.; *see also* 47 C.F.R. § 76.981(b) (1994).

In determining whether this regulation is a permissible interpretation of the statute, the Supreme Court's analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides the matrix for our analysis. If the Congress has spoken on the precise question at issue and its intent is clear, "that is the end of the matter." *Id.* at 842. Both this court and the FCC are bound by the command of the statute. If the Congress has not spoken directly to the issue and the statute is silent or ambiguous, we do not impose our construction of the statute. Rather, we are obliged to defer to the interpretation of an ambiguous statute by the agency charged with the responsibility for administering it as long as the agency's interpretation is based upon a permissible reading of that statute. *Id.* at 843.

As the district court noted, the first focus must be the statute itself. Under *Chevron*'s first step, the plain language of a statute is the most reliable indicator of congressional intent. *Castellon-Contreras v. INS*, 45 F.3d 149, 153 (7th Cir. 1995) (quotation and citation omitted). The statutory language should be conclusive "except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Id.* (quotation and citations omitted). Nevertheless, "[a] literal construction is inappropriate if it would lead to absurd results or would thwart the obvious purposes of the statute." *NuPulse, Inc. v. Schlueter Co.*, 853 F.2d 545, 549 (7th Cir. 1988) (quotation and citations omitted). We must employ the "traditional tools of

statutory construction" to ascertain whether the Congress had an intention on the precise question at issue. *Chevron*, 467 U.S. at 843 n. 9. Therefore, we must remember that the "'true meaning of a single section of a statute ..., however precise its language, cannot be ascertained if it be considered apart from related sections [.]'" *Commissioner v. Engle*, 464 U.S. 206, 223 (1984) (quoting *Helvering v. Morgan's Inc.*, 293 U.S. 121, 126 (1934)). The design of the entire statute can reveal the intent of the Congress. *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Hanson v. Espy*, 8 F.3d 469, 473 (7th Cir. 1993).

2.

Upon examination of the statutory section in question, 47 U.S.C. § 543(f), we cannot conclude that the intent of the Congress is so unambiguously stated as to preclude further interpretation by the agency charged with the administration of the statute. The district court was of the view that the terms of the section were unambiguous and interpreted the section as requiring that each "service" be requested "by name." However, the statutory language does not, by its own force, answer the question of whether the unbundling or the mere relabeling of existing services was intended to trigger the statutory obligation to solicit an affirmative request by the customer before the service can continue. A literal interpretation of the statute also would require affirmative marketing to the customer each time a station was substituted--a very burdensome requirement producing significant compliance costs that would be difficult to reconcile with the contemplated rate regulation scheme.

Structural concerns must also be considered. The Congress' inclusion of this subsection in the section that deals with rate regulation, 106 Stat. 1469; *see* 47 U.S.C. § 543(f), rather than in the section that deals with consumer protection, 106 Stat. 1484, *see* 47 U.S.C. § 552(c),

raises an inference that the requirement that an affirmative request be received from the customer was recognized to be at least a factor in the administration of the regulatory scheme for rates.[8]

Having determined that the intent of the Congress is not clear from the bare language of the statute, nor from its structure, we must, consistent with the methodology set forth in *Chevron*, now determine whether the interpretation given the statute by the FCC, the agency charged by the Congress with its administration, is reasonable. If the agency has interpreted the statute in a reasonable manner, that interpretation must prevail. *Chevron*, 467 U.S. at 844.

The regulation in question purports to shield certain alterations in the cable menu, including the one at issue here, from the scope of state consumer protection laws that forbid negative option billing practices. We therefore must determine whether the FCC, in displacing the state consumer protection laws with respect to these practices, has acted within its authority by reasonably interpreting the statutory directive. *See De La Cuesta*, 458 U.S. at 154.

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[8]*See Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1039 (D.C. Cir. 1986) (stating that subtitle "Jurisdiction of Courts," which was part of the statute as enacted by Congress, indicated "Congress's intention that the time limitation [expressed in a particular section within the subtitle] be jurisdictional"); *see also Railway Labor Execs. Ass'n v. Consolidated Rail Corp.*, 666 F.Supp. 1573, 1581 n. 5 (Regional Rail Reorg. Ct. 1987) ("Where a subtitle descriptive of legislation is part of the act, rather than having been added by a compiler or publisher, it is to be taken as an expression of Congressional intent in creating the legislation and may be looked to in interpreting the statute."); *cf. United States v. Castro*, 837 F.2d 441, 442 n. 1 (11th Cir. 1988) (noting that title or section heading may not be used to glean legislative intent when it is added by those responsible for codification rather than by Congress).

3.

To determine whether the FCC reasonably concluded that it was authorized to undertake the preemption contained in its regulations, we must first examine the 1992 Cable Act.[9] The 1992 Cable Act expressly preempts state regulation of cable rates. Section 3(a) of the Act states that "[n]o Federal Agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title." 47 U.S.C. § 543(a)(1).[10] Subsection 543(f), as we have noted above, contains what at least superficially appears to be a categorical prohibition against negative option billing. Notably, this subsection is located in the section of the Act that deals with rate regulation,

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[9]For a comprehensive survey of the history of federal-state regulatory authority over the cable television industry prior to the 1992 Act, *see Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91, 95-98 (2d Cir. 1992).

[10]"Cable Service," the operative term in § 543(a)(1), is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." 47 U.S.C. § 522(6). Pursuant to § 543(a)(2)(A), states may regulate rates for the provision of basic cable service, i.e., service tiers that include "the retransmission of local broadcast signals," *id.* § 522(3), of a cable system that the Commission determines is not subject to "effective competition." *Id.* § 543(a)(2)(A); *see id.* § 543(l)(1) (defining manner in which "effective competition" is determined); *see also id.* § 543(l)(2)(B) (indicating that individually priced channels, as opposed to packages of such channels, are not subject to rate regulation). Section 532, 47 U.S.C. § 532, subjects cable operators to various commercial use requirements. In light of the statutory sections outlined above, the parties do not dispute that Wisconsin was precluded from regulating the rates Time Warner charged for its a la carte service.

not in the section dealing with consumer protection. Section 543 must be read, however, in conjunction with another section of the Act that explicitly addresses preemption with respect to state consumer protection laws. Section 8(c)(1) of the statute provides:

> Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.

106 Stat. 1484; *cf.* 47 U.S.C. § 552(c)(1).[11] Previously, this same provision read that state consumer protection laws survived preemption "to the extent not inconsistent with this title." 98 Stat. 2796; *cf.* 47 U.S.C. § 552(c) (1991) (replacing "title" with "subchapter"). Each version of the statute, but especially the new version, applicable in this case, suggests that Congress envisioned a regulatory regime in which cable operators would be subject both to the federal requirements of the 1992 Cable Act with respect to matters of rate regulation and, at the same time, to the requirements of certain state consumer protection laws.[12] Indeed, the legislative history of the section

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[11]In the codified version of § 552(c)(1), the word "subchapter" appears in place of the word "title." *See* 47 U.S.C. § 552(c)(1). However, the Statutes at Large uses the word "title." *See* 106 Stat. 1484; *see also* 47 U.S.C.S. § 552(c)(1) (using "title"). "We follow the general rule that in the event of a conflict between the Statutes at Large and the United States Code, the language in the Statutes at Large controls." *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 193 n. 12 (D.C. Cir. 1995) (opinion for the court of Rogers, J.) (construing § 552(c)(1)) (*citing United States v. Welden*, 377 U.S. 95, 98 n. 4 (1964)).

[12]*See American Agric. Movement, Inc.*, 977 F.2d at 1155 (concluding that existence of preemption savings clause indicates that Congress did not intend to preempt the field and that the existence of both a preemption provision and a savings clause

(continued...)

confirms such a congressional intent: "Section [552(c)(1)] makes it clear that nothing in Title VI is intended to interfere with the authority of a state or local governmental body to enact and enforce consumer protection laws, to the extent that the exercise of such authority is not specifically preempted by the Title." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 1, 78 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1231, 1260; *see also Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 194-95 (D.C. Cir. 1995) (opinion for the court of Rogers, J.) (noting that Cable Act neither expressly preempts state consumer protection laws nor occupies the field).

4.

On the basis of the statutory scheme surveyed in the above section, the FCC decided to treat the statutory negative option billing prohibition as less than a categorical command admitting of no exceptions. Its negative option billing regulation, 47 C.F.R. § 76.981, permits some forms of negative option billing. The current version makes explicit the FCC's intent to preempt conflicting state consumer protection laws:

> State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraphs (a) or (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. § 543.

47 C.F.R. § 76.981(c) (1994). This version of the regulation was promulgated in December 1994, and thus clearly applies to preemption analyses conducted after that date. However, because the action of Time Warner involved an

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[12](...continued)
evidences a legislative intent to preempt some, but not all, state regulation).

earlier period, we must also address the earlier versions of the regulation. The Commission's intent with respect to the preemptive effect of 47 C.F.R. § 76.981 as of August 31, 1993 is less clear. The previous version of 47 C.F.R. § 76.981 did not address its preemptive effect within the text of the regulation; the Commission's comments occurred in two brief footnotes.[13] In the process of promulgating its regulations implementing the 1992 Cable Act, the Commission suggested, prior to the time Wisconsin initiated its enforcement action, that state and local laws were preempted to the extent that they regulated alleged negative option billing in a manner inconsistent with the dictates of section 76.981.[14]

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[13]In *Cable Television Association of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), the Second Circuit expressed concern over finding an intention to preempt in a footnote when there was "no indication that the FCC considered the pre-emptive reach of its statement." *Id.* at 100. In *Finneran*, the footnoted statement addressed a different subsection of the 1984 Cable Act than the subsection whose preemptive effect was at issue, and the footnote, in the court's view, actually had the effect of authorizing, rather than foreclosing, state regulation. *Id.* In contrast, the two footnoted statements in this case addressed negative option billing and, seemingly, had the effect of cabining state regulation. *Cf. City of N.Y.*, 486 U.S. at 65 (indicating that there was "no room for doubting" that FCC intended to preempt state technical standards governing the quality of cable television signals where, in adopting regulation, FCC clearly referenced its preemptive intent); *De La Cuesta*, 458 U.S. at 158 (noting that any ambiguity in regulation's language was dispelled by the preamble accompanying the regulation, which "unequivocally" expressed the agency's intention to displace state law).

[14]*See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order, and Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631, 5905 n. 1095 (adopted Apr. 1, 1993, released May 3, 1993) ("Some municipalities argue that state and local

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The Commission addressed the preemptive effect of its negative option billing rule in more detail in its Third Order on Reconsideration.[15] Despite its mixed signals, the Third Order is best read as the Commission's attempt to clarify its earlier opaque pronouncements on the issue of preemption.[16] In this Third Order, the Commission

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[14](...continued)
governments should have concurrent enforcement powers over negative option billing practices.... We do not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services or associated equipment consistent with the implementing rules we adopt and their powers under state law to impose penalties."); *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 F.C.C.R. 1164, 1209 n. 127 (adopted and released Aug. 27, 1993) ("We similarly affirm that franchising authorities may not regulate tier restructuring in a manner that is inconsistent with the 1992 Cable Act.... In particular, local authorities are precluded from regulating negative option billing to prevent tier restructuring regardless of how the local requirement is characterized. The Commission has ruled that cable operators may engage in revenue-neutral tier restructuring without violating the negative option billing procedure.").

[15]*In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition*, Third Order on Reconsideration, 9 F.C.C.R. 4316 (adopted Feb. 22, 1994, released Mar. 30, 1994).

[16]Much of the language in the Third Order suggests that it was meant to clarify: *E.g.*, "Language in previous decisions has created confusion," 9 F.C.C.R. at 4359, "our footnotes *may* be construed," *Id.* at 4360 (emphasis added). However, the Commission also stated that it was "substituting the following analysis" for its earlier statements. We also note that the Commission inserted an effective date of May 15, 1994 in the Third Order's ordering clause, even though the Order was issued
(continued...)

admitted that "[l]anguage in previous decisions in this proceeding has created confusion concerning this issue." 9 F.C.C.R. at 4359. The Commission recognized that, despite their limited analyses, its earlier footnote statements might "be construed as attempting to preempt states ... from regulating negative option billing in a manner inconsistent with our rate regulation rules generally and our specific rule addressing negative option billing." *Id.* at 4360 & nn. 79-80. The Commission then noted that, on its own motion, it had concluded that state and local governments generally could regulate negative option billing under their consumer protection laws, and further noted that it was "substituting" its analysis for the earlier footnoted statements. *Id.* at 4361. The Commission supported its reasoning by analyzing sections 543(a)(1) (preemption of rate regulation), 543(f) (negative option billing prohibition), and 552(c)(1) (consumer protection law savings provision) of Title 47. The FCC determined that the statutory prohibition on negative option billing, 47 U.S.C. § 543(f), was "more in the nature of a consumer protection measure rather than a rate regulation provision per se." Third Order on Reconsideration, 9 F.C.C.R. at 4361. Accordingly, the Commission reasoned, given that the negative option billing prohibition was directed at

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[16](...continued)
Mar. 30, 1994. *See id.* at 4373, ¶ 159. There is authority for the proposition that postponement of the effective date of a regulation evinces an intent that it be prospective. *See, e.g., Wright v. Director, FEMA*, 913 F.2d 1566, 1572 n. 13 (11th Cir. 1990) (noting that postponement of effective date of regulation evinces an intent for prospective application); *accord Criger v. Becton*, 902 F.2d 1348, 1351 (8th Cir. 1990); *cf. Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 747 (D.C. Cir. 1986) (noting same with respect to provisions of 1984 Cable Act). However, 47 C.F.R. § 76.981 is not among the provisions that actually were amended per the order in ¶ 159. *See* 9 F.C.C.R. at 4373. We believe, therefore, that postponement of the effective date does not relate to possible clarification of § 76.981, which was effective September 1, 1993.

consumer protection, state and local governments, "by virtue of the preservation of authority" under section 552(c)(1), generally would possess concurrent jurisdiction to regulate negative option billing practices. *Id.* at 4363. The Commission noted, however, that, in light of 47 U.S.C. § 543(a)(1), it would consider the question of federal preemption in particular cases involving state or local regulation that went beyond consumer protection and instead "approaches actual regulation of rates." Third Order on Reconsideration, 9 F.C.C.R. at 4363. Thus, in its Third Order, the Commission indicated that its negative option billing regulation rarely would be found to preempt state consumer protection laws.[17]

After we heard oral argument in this case, the Commission issued another order, which it describes as "clarifying" its position on preemption. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration*, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 F.C.C.R. 1226 (adopted Nov. 10, 1994, released Nov. 18, 1994). This order, denominated the "Going Forward" order or the "Sixth Order on Reconsideration," set forth a two-part analysis for determining whether federal law and regulation preempts state and local regulation of negative billing practice

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[17]*See Time Warner Entertainment Co.*, 56 F.3d at 194-95 (opinion for the court by Rogers, J.) (noting that the Third Order on Reconsideration treats the negative billing option section of the 1992 Act as a consumer protection provision rather than a rate regulation provision). The court made this comment in the course of deciding that the 1992 Act did not preempt the issue of negative option billing either expressly or by field preemption. Notably, the court did not have before it the issue that we face in this case today--whether the FCC regulation specifically preempts the enforcement of state negative option billing laws in the narrow situation of relatively minor adjustments in programming.

options. First, the court must determine whether the local negative option rule is consistent with the federal rule. If it is consistent, the local rule may be enforced. If the local rule is inconsistent with the federal rule, however, then a second question must be addressed--whether the local rule undermines the federal regulation. The Commission elaborated: "[S]tate or local consumer protection laws may not be enforced in a manner that conflicts with or undermines our rate regulation rules established pursuant to Section 3 of the 1992 Cable Act." Sixth Order on Reconsideration, 10 F.C.C.R. at 1265.

The various pronouncements of the Commission can certainly not be characterized as a seamless garment and we are invited for that reason to forego the usual deference owed to an administrative agency's regulatory interpretation of the statute which the Congress has charged it to administer.[18] Without extended discussion, our colleagues in the District of Columbia Circuit found that the Going Forward Order constituted clarification of the Commission's position and thereby stated the legitimate position of the agency. *Time Warner Entertainment Co.*, 56 F.3d at 195 n. 18 (opinion for the court of Rogers, J.). We cannot disagree with that conclusion. In our view, the various interpretations of the Commission are best viewed as presenting an evolving focus, rather than conflicting pronouncements on the issue of preemption. Accordingly, we view the Commission's pronouncements as clarifying the agency's position, not altering it. *Cf. Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (stating that, although substantive rule changes typically may be applied only prospectively, a rule "simply

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[18]*See, e.g., Batanic v. INS*, 12 F.3d 662, 666 (7th Cir. 1993) ("When an agency gives inconsistent interpretations of a statute ... those interpretations do not warrant our deference.") (*citing Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991)); *cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

clarifying an unsettled or confusing area of the law ... does not change the law, but restates what the law according to the agency is and has always been," and also noting that "we will defer to an agency's expressed intent that a regulation is clarifying unless the prior interpretation of the regulation or statute in question is patently inconsistent with the later one").

Our review of the FCC's various pronouncements on the issue of preemption reveals, as the statutory structure also suggests, a tension between two policy concerns--federal control of those matters that impact upon the rate structure and state freedom to enforce consumer protection measures in those areas that do not affect the rate structure. Throughout the history of the FCC's multifarious pronouncements, it seems clear that the agency consistently has reconciled this tension by opting for the protection of the rate structure whenever that structure is jeopardized by the application of state consumer protection legislation. We cannot say that this interpretation of section 543(f) is inconsistent with the Cable Act.

What is less clear is the degree to which, in the FCC's view, it is necessary to protect the rate structure from the influences of state law. Time Warner notes that a state administrative proceeding to enforce its consumer protection law could have resulted in an order by the State to disgorge revenue it earned under the disputed billing practice. Such an order, Time Warner argues, would set retroactively the rate for its a la carte service at zero. Such action, Time Warner submits, is specifically preempted by 47 U.S.C. § 543(a), and therefore may not be "saved" under 47 U.S.C. § 552(c)(1). As the district court noted, the imposition of such a remedy would indeed be problematic and, although this prospect is no longer a realistic one in

this case,[19] we must still consider the potential impact of such a state remedial device in assessing the reasonableness of the federal regulation. Were the State to order Time Warner to turn over all of its receipts from the sale of the a la carte service, Time Warner essentially would have been required to provide the service for free. However, as noted above, the Cable Act prohibits the State from regulating the rates Time Warner charged for this service. Accordingly, the FCC acted reasonably to the extent its regulation preempts the state statutory remedy of disgorgement of the revenue earned under the disputed billing practice.

In its submission as amicus curiae, the FCC suggests that the removal of the possibility that Time Warner will be made to disgorge its profits also removes the threat to the rate structure and, consequently, the need to preempt the state consumer protection statute. The FCC also notes that Time Warner already has marketed affirmatively its four-channel package and therefore the marketing costs will not impact further on the rate structure. On the other hand, the Commission does admit that, except for the accident of the post-litigation agreement, the actions taken by Time Warner in this case would fall within the preemptive protection of the FCC's regulation. It points out that in paragraph 118 of its Going Forward Order, 10 F.C.C.R. at 1267, it expressly noted that, in cases not involving a fundamental alteration in the nature of a tier, the transaction costs involved in complying with a state negative option billing prohibition would impact on the rate rules by discouraging the provision of new services at a reasonable cost. Such a state prohibition would act as significant incentive to carriers to freeze service offerings. Local law would in effect set rates by

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[19]In an agreement executed after the litigation in the district court, the parties to this suit have agreed that Wisconsin will not seek such a remedy against Time Warner in any future state administrative proceeding.

discouraging the addition, deletion or replacement of channels, even when the change worked no fundamental alteration in the nature of the tier.

In our view, the statement of the FCC in its Going Forward Order is a rational expression of the same theme that it has articulated throughout its pronouncements on negative option billing: The rate structure is a federal matter and state consumer laws that impact upon it conflict with the operation of the rate structure. The Commission's litigation position that the post-litigation agreement between the parties in this case somehow negates the protection that otherwise would be afforded to Time Warner is unconvincing. The simple fact of the matter is that the Wisconsin consumer protection statute was preempted at the time that the Wisconsin Attorney General commenced the state action against Time Warner. The FCC's litigation position fails to take into account that Time Warner, at the time it acted, had the right to rely upon the federal regulation that permitted the activity which it undertook. In our view, the actions of Time Warner were, at the time that it took them, permitted by the federal regulation authorizing a limited range of negative option billing whose prohibition by the states would interfere with the execution of the Commission's rate rules. We believe that the federal regulations, to the extent that they preempt state law, are a permissible interpretation of the congressional authority given the FCC in the 1992 Cable Act.

Conclusion

Accordingly, the judgment of the district court is reversed.

REVERSED

FERGUSON, *Circuit Judge*, dissenting. I dissent from the majority opinion for two reasons. First, the

district court and the majority should have abstained from deciding this case, and second, even if the abstention doctrine did not apply, the majority erred in its preemption analysis.

I.

The dispute between the parties began with an enforcement action filed by the State before the Wisconsin Department of Agriculture, Trade and Consumer Protection. The State charged plaintiff Time Warner with violation of Wis. Stat. § 100.20 (1995), a state consumer protection law which provides in part:

> (1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

Wis. Stat. § 100.20(1). The State sought to enforce this unfair trade practice statute through an injunction prohibiting Time Warner from continuing its practice of charging existing customers for a la carte channels by a method that the state alleged amounted to negative option billing. Time Warner then filed suit in federal district court to enjoin the state administrative proceeding. In federal court, Time Warner argued that the Wisconsin statute was preempted by a Federal Communications Commission ("FCC") regulation and that Wisconsin's attempt to regulate Time Warner's conduct violated the federal 1992 Cable Television Consumer Protection and Competition Act.

Under these circumstances, the district court was required to abstain from deciding Time Warner's claim pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). This Court recently described the importance of the *Younger* abstention doctrine in *Trust & Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290 (7th Cir. 1994), when it stated that

the most important reasons for applying the *Younger* abstention doctrine are "the notions of comity and federalism at the heart of our nation's delicate balancing act." *Id.* at 294. The *Younger* abstention doctrine requires a federal court to pay careful attention to the interests of the state in order to protect those interests.

Comity may even require a federal court to recognize the state's interest *sua sponte* and to apply abstention principles, including a *Younger* abstention, when the attorney general may not have recognized the need to do so. *Bellotti v. Baird*, 428 U.S. 132, 143 n. 10 (1976) ("[I]t would appear that abstention may be raised by the court *sua sponte*."); *Waldron v. McAtee*, 723 F.2d 1348, 1350 (7th Cir. 1983) (abstaining pursuant to *Pullman*, stating "the court has the power and in an appropriate case the duty to order abstention, if necessary for the first time at the appellate level, even though no party is asking for it."); *O'Neill v. City of Philadelphia*, 32 F.3d 785, 786 n. 1 (3d Cir. 1994) (citing *Bellotti* in support of its statement that "[e]ven though the question of *Younger* abstention was not raised by the parties on appeal, we may consider it *sua sponte*."), *cert. denied*, 115 S.Ct. 1355 (1995). Unlike other forms of abstention, which vest the district court with discretion to decline jurisdiction, a *Younger* case proscribes discretion and requires the district court to abstain. *Hogsett*, 43 F.3d at 294.

The *Younger* abstention doctrine applies equally to state administrative proceedings that are judicial in nature and that implicate important state interests. *See Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1982) (*Younger* abstention applied in light of a state lawyer disciplinary proceeding); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986) (*Younger* abstention applied in light of a proceeding before a state civil rights commission); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S.

350, 367-68 (1989) (*Younger* abstention appropriate where an important state interest is implicated).

In *Hogsett*, this Court adopted a three-part test to determine the applicability of the *Younger* abstention doctrine: 1) are there ongoing state judicial proceedings; 2) do the proceedings implicate an important state interest; and 3) is there an adequate opportunity in the state proceeding to raise constitutional challenges? *Hogsett*, 43 F.3d at 295. If so, the district court must abstain from deciding the controversy. *Id.* at 294.

The first part of the test is easily satisfied here. The state proceedings have not been resolved before the Wisconsin state agency, nor have they been reviewed by the state courts. As for the second part of the test, there are few state interests that are more important or more clearly within the proper control of the state than consumer protection. *See, e.g., California v. ARC America Corp.*, 490 U.S. 93 (1989) ("Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the states."). In contrast to free speech and other cases involving federal rights, the protection of consumers falls within the traditional police power of the state. *Id.* One indicator of the importance of the state interest in protecting consumers is the fact that the state's attorney general instituted the state proceeding and was the named defendant in the federal suit. *See Middlesex County Ethics Comm.*, 457 U.S. at 434-35. The district court and the majority have failed to consider the substantiality of the state's interest in the generic proceedings in this case.

In addition to the substantial impact on consumer protection caused by Time Warner's practice of billing its customers for a la carte services, this practice also strongly implicates traditional contract law. When Time Warner agrees to provide cable television services to a customer,

Time Warner forms a contract with the customer to provide enumerated services. Time Warner's alteration of its billing scheme is potentially a violation of the contract and the terms as provided therein. These basic contract considerations are also best protected by the state in its protection of consumers as well as in its regulation of the enforcement of contracts formed within its jurisdiction.

Important considerations of comity and federalism are raised in this case, but the district court and the majority fail to consider them. The state's broad interest in protecting consumers by enjoining what it adjudicates to be unfair trade practices should not be so easily limited by the federal courts, particularly when that interest is being developed in an ongoing proceeding. As this Court has acknowledged, "'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always [must] endeavor[ ] to do so in ways that will not unduly interfere with the legitimate activities of the States.'" *American Federation of State, County, and Municipal Employees v. Tristano*, 898 F.2d 1302, 1304 (7th Cir. 1990) (quoting *Younger*, 401 U.S. at 44). In this case, the district court should have balanced the state's interest in protecting its consumers through enforcement of its consumer protection statute against the federal interest in determining the preemptive effect of a federal regulation. Had the district court properly weighed these interests, it would have understood that the state's interest clearly can, and in this case, does outweigh the federal interest in resolving the potential preemption question. *See New Orleans Public Service*, 491 U.S. at 365 (holding that the federal interest in enforcing the Supremacy Clause did not outweigh the state's interest in regulating its utilities).

Finally, the third part of the *Younger* test is also resolved in favor of abstention in this case. Whether the Wisconsin Department of Agriculture, Trade & Consumer Protection will be able to or will chose to decide the

constitutional issues that may arise in this case has yet to be determined. However, the critical fact for the purposes of the *Younger* abstention doctrine is *whether* a party has an adequate *opportunity* to raise constitutional challenges. The Wisconsin statute itself provides for judicial review of the Wisconsin agency's actions. Wis. Stat. § 100.20(4) (citing the Wisconsin Administrative Procedure Act, Wis. Stat. § 227 (1995)) (section 227.52 provides for judicial review of administrative decisions adversely affecting the substantial interest of any party). Therefore, the third prong of the *Younger* test is satisfied.

Even were the district court to have found that it was not required to abstain in this case pursuant to *Younger*, the district court nevertheless had the discretion to abstain. The district court should have exercised its discretion and abstained on the basis of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). As this Court has previously held, "[t]he main purpose of the *Pullman* doctrine is to avoid, if possible, declaring a state statute unconstitutional, by giving the state courts a chance to interpret it narrowly." *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 847 (7th Cir. 1985). *Pullman* abstention may be applied so long as two requirements are met: 1) there is some risk that the state statute will be found unconstitutional unless narrowed; and 2) there is some reasonable chance that the state statute can be narrowed through interpretation. *Id.* The Supreme Court has applied *Pullman* abstention where the preemptive effect of a federal law could have been avoided or limited by a narrow interpretation of the state statute. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 512 (1972) (holding that the district court should have abstained pursuant to *Pullman* in order to allow the state courts to resolve ambiguities in the state law that were sufficiently likely to modify the federal questions, including preemption, raised by the appellants).

Indeed, in this case the *Pullman* abstention is clearly applicable precisely because the FCC regulation will have no preemptive effect if the Wisconsin agency interprets the state statute narrowly. Thus both of the *Pullman* requirements are satisfied. First, there is some risk that the Wisconsin consumer protection statute will be found to be unconstitutional if the state applies it in the face of a preemptive FCC regulation. *See MacMullan*, 406 U.S. at 512. Second, there is a reasonable chance that the Wisconsin Department of Agriculture, Trade & Consumer Protection will interpret the consumer protection statute narrowly enough that it will have no impact on cable rate-setting or on the other subject matter of the 1992 Cable Television Consumer Protection and Competition Act or the FCC regulation.

Moreover, the Wisconsin agency may determine that the Wisconsin statute is either invalid or that it is not violated in this particular circumstance. Just as in MacMullan, the state agency's determinations in this matter could completely modify or render moot the federal questions raised by Time Warner. *MacMullan*, 406 U.S. at 512. The district court should have abstained in order to allow the state proceedings to resolve this controversy through its interpretation of the state statute.

II.

In addition to failing to abstain in this case, the majority have also erred in holding that the Wisconsin consumer protection statute is preempted by the 1992 Cable Act and its derivative FCC regulations.

The majority conclude that the Wisconsin law is preempted because the consumer protection law in issue will affect the rate structure of cable services. This argument is not only contrary to established law, but it also elevates form over substance.

The Supreme Court has consistently imposed a strong presumption against preemption.

> Consideration of issues arising under the Supremacy Clause 'start with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.'

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In its most recent decision on preemption, the Supreme Court rejected a broad reading of the seemingly expansive term "relate[s] to" as potentially unbounded. *N.Y. State Conference of Blue Cross v. Travelers Ins.*, 115 S.Ct. 1671, 1677 (1995). Nevertheless, the majority here argues that "the transaction costs involved in complying with a state negative billing prohibition [will] impact on the rate rules by discouraging the provision of new services at a reasonable cost," *supra* at 882. This reasoning, taken to its logical end, is also potentially unbounded as it results in all state consumer laws being classified as "rate structures." Such an interpretation would require all consumer protection laws to be preempted since all such regulation potentially affects cable rates--albeit indirectly. Such an expansive interpretation has already been rejected under the Cable Communications Policy Act of 1984 and need not be revived. *See Cable Television Ass'n v. Finneran*, 954 F.2d 91 (2d Cir. 1992) (holding that a statute that preempts "regulation of rates" does not preempt state regulation of matters that may affect cable rates indirectly).

Here, the federal preemption question is resolved by the terms of the statute. The Act provides that:

> [a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name.

47 U.S.C. § 543(f). There is no dispute that the term "service" includes each of the individual channels that were "unbundled" in this case. Despite the plaintiff's claim that the subscriber "affirmatively requested" the a la carte channels by agreeing to the original cable package, the fact remains that the subscriber never requested the "unbundled" channels "by name," as the statute requires. The Cable Act provides that before any subscriber receives any individual channel, the subscriber must affirmatively request that channel "by name." Subscribing to a general package of cable channels is not requesting each of those channels "by name."

The statutory language is unambiguous and, as a result, there is no need to examine the reasonableness of the interpretation given to the statute by the FCC. The plain meaning of the language of the 1992 Cable Act establishes that the Wisconsin consumer protection law is not preempted.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-55112

PALMER COMMUNICATIONS, INC. and Colony Communications, Inc.

Plaintiffs-Appellants,

v.

TOTAL TV,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California

Argued and Submitted June 8, 1995
Decided October 24, 1995

Before: PREGERSON, POOLE, and D.W. NELSON, *Circuit Judges.*

POOLE, *Circuit Judge.* Appellants, cable television operators Colony Communications, Inc. ("Colony") and Palmer Communications, Inc. ("Palmer"), interlocutorily appeal the district court's denial of their motion to dismiss on federal preemption grounds competitor Total TV's diversity action. We granted permission to appeal pursuant to 28 U.S.C. § 1292(b), and we affirm.[1]

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[1]The motion of the California Cable Television Association to file an amicus curiae brief on behalf of appellants is granted. The brief submitted on May 2, 1994 is deemed filed.

I. Background

Colony is a franchised cable operator that provides cable television services in California and other parts of the United States. Before it was purchased by Colony, Palmer was also a franchised cable operator in California. They are subject to federal regulation as franchised cable operators, under both the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.* (1988) (amended 1992), and the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 521 *et seq.* (Supp. IV 1992) (collectively "the Cable Acts"). Total TV operates as a "cable television dealer" and competes with Colony and Palmer for certain private customers[2] in the Coachella Valley of Riverside County, California, but is not subject to federal regulation of its subscriber rates because it is a non-franchised dealer.

This action was originally filed in California state court by Total TV, which maintains that appellants are attempting to drive it out of the Coachella Valley by engaging in below-cost predatory pricing with the intent to destroy competition in violation of the California Unfair Practices Act ("UPA"), Cal. Bus. & Prof. Code § 17043.[3] Total TV seeks monetary damages and an injunction prohibiting appellants from continuing their predatory

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[2]These so called "private customers" live in private or gated communities represented by homeowner associations. The associations enter into contracts with cable television operators to provide service throughout the communities. The associations are billed directly for cable service and typically pass the costs onto the individual residents as part of the monthly dues.

[3]California Business and Professions Code § 17043 provides in relevant part: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof.... for the purpose of injuring competitors or destroying competition."

pricing. Colony and Palmer claim that such relief would prohibit them from charging their current rates, effectively regulating them in contravention of the Cable Acts.

The action was removed by the appellants to the Central District of California on the basis of diversity of citizenship. Colony and Palmer then filed a motion to dismiss Total TV's complaint pursuant to Fed. R. Civ. P. 12(b)(6), based on the express preemption provisions of the Cable Acts. On May 28, 1993, the district court issued a tentative motion granting the motion to dismiss. However, after ordering additional briefing, the district court issued an order on September 20, 1993, denying the appellants' motion to dismiss on preemption grounds. On December 20, 1993, the district court certified that order for interlocutory appeal, and on January 21, 1994, we granted appellants' petition to review the order.

II. Rate Regulation

We review de novo a dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Everest and Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* We also review de novo the district court's decision regarding preemption. *See Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1500 (9th Cir. 1993) (reviewing the district court's determination that ERISA preempted a state law claim); *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993) (reviewing the district court's determination that FCIA preempted all state law claims).

The issue of whether the Cable Acts preempt state laws is one of first impression in this Circuit. The 1992 Act provides in relevant part: "no federal agency or state may regulate the rates for the provision of cable services."

47 U.S.C. § 543(a)(1) (Supp. IV 1992).[4] We hold that the Cable Acts do not preempt the provisions of the UPA that Total TV invokes because these provisions do not regulate appellants' rates. The UPA is "not a price fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor." *People v. Gordon*, 105 Cal. App. 2d 711, 234 P.2d 287, 292 (1951) (quoting *Wholesale Tobacco Dealers Bureau Inc. v. National Candy & Tobacco Co.*, 11 Cal. 2d 634, 82 P.2d 3, 15 (1938)).

Even assuming that Total TV receives the relief it requests, Colony's and Palmer's prices will not be regulated directly and, as long as they do not act with discriminatory purpose, they will be free to "sell [their] merchandise at any price [they] please in the ordinary course of business." *Food & Grocery Bureau of So. Cal. v. United States*, 139 F.2d 973, 974 (9th Cir. 1943). Therefore, the UPA provisions in question do not operate to regulate rates within the meaning of the Cable Acts' preemption clause. Nowhere in the legislative history of either Act is there a suggestion that "rate regulation" includes predatory pricing or price discrimination measures.

Our conclusion is bolstered by the D.C. Circuit's recent decision affirming the F.C.C.'s interpretation that the prohibition of negative option billing is "a consumer protection provision rather than rate regulation." *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 194 (D.C.

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[4]Section 543(a) of the 1984 Cable Act provides that "[a]ny Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section." 47 U.S.C. § 543(a) (1988). In the 1992 Act, the wording of the clause was changed slightly and recodified as § 543(a)(1). That section reads in part: "[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title." 47 U.S.C. § 543(a)(1) (Supp. IV 1992).

Cir. 1995). The D.C. Circuit concluded that the statutory prohibition of negative option billing did not preempt, but rather coexisted with, state consumer protection laws. *Id.* at 192-93. Like the UPA, the negative option laws are directed at the seller's conduct rather than the seller's actual rates. Because they do not directly affect rates, they are not rate regulations.

Appellants' reliance on *Storer Cable Communications v. City of Montgomery, Ala.* is misplaced. 806 F.Supp. 1518, 1542-44 (M.D. Ala. 1992) (holding that an ordinance regulating rates charged to subscribers was preempted by the 1984 Cable Act). The statute at issue in Storer not only set particular cable television rates, but was directed specifically at the cable industry in clear violation of the Cable Acts.[5] *Id.*

III. Preemption

The Supremacy Clause invalidates state laws that "interfere with, or are contrary to" federal law. *See* U.S. Const., Art. VI, cl. 2; *Hillsborough County, Fla. v. Automated Medical Labs.*, 471 U.S. 707, 712-13 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). There are three types of federal preemption of state statutes: (1) express preemption; (2) implied preemption; and (3) preemption that arises because the federal and state statutes conflict, making compliance with

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[5]Other cases relied upon by appellants are also distinguishable, as noted by the district court, because they do not concern statutes of general applicability. *See, e.g., Westmarc Communications, Inc. v. Conn. Dep't. of Pub. Util. Control*, 807 F.Supp. 876 (D. Conn. 1990) (involving an order affecting rates directly aimed at a cable company); *Housatonic Cable Vision v. Dep't of Publ. Util. Control*, 622 F.Supp. 798 (D. Conn. 1985), and *Comcast Cablevision, Inc. v. City of Sterling Heights*, 178 Mich. App. 117, 443 N.W.2d 440 (1989) (involving fees unrelated to rates for the provision of cable services).

both impossible. *Hillsborough County*, 471 U.S. at 713. We consider only the theory of express preemption in this appeal.[6]

In determining the preemptive scope of the Cable Acts, we must discern and effectuate Congressional intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). The Cable Acts were passed to foster competition in the cable industry. *See Time Warner*, 56 F.3d at 184 ("The government's interest in regulating cable rates is evident--protecting consumers from monopoly prices charged by cable operators who do not face effective competition.").

The UPA complements, not undermines, the Cable Acts. Like the Cable Acts, the UPA was designed to "encourage competition, by prohibiting unfair ... and discriminatory practices by which fair and honest competition is destroyed or prevented." Cal. Bus. & Prof. Code § 17001. Thus, the Cable Acts do not preempt the UPA because the federal laws and the state law share the same purpose. *See Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014, 1050 n. 62 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 825 (1982).

Although under certain circumstances federal regulations have been held to explicitly preempt generally applicable state statutes, *see, e.g., Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 858 F.2d 567, 569-70 (9th

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[6]The theory of implied preemption, not argued by the appellants, is nevertheless unavailable here because "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975). Appellants have failed to make that showing.

Cir. 1988) (claims brought under California state antitrust statutes preempted by Staggers Railway Act), Congress clearly did not intend the Cable Acts to preempt generally applicable state antitrust laws such as the UPA. By stipulating in § 543(a) of the 1984 Cable Act that a federal agency may not "regulate the rates" for cable services, Congress revealed its intent to limit preemption of state law under the Cable Acts. *See* 47 U.S.C. § 543(a) (1988) (amended 1992). The Supreme Court has differentiated between the phrases "regulate" and "related to regulation." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 377 (1992) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). The former is associated with a more limited preemptive intent. The latter phrase, which is not used in § 543(a), signifies a broad preemptive purpose sufficient to preempt state laws of general application such as the UPA. Other courts have held similarly regarding the preemptive scope of § 543. *See Cable Television Ass'n v. Finneran*, 954 F.2d 91, 101 (2d Cir. 1992) ("the language of the preemption clause at issue [*e.g.* § 543(a)] fails to evince an intention to carve out a wide area free of state regulation").

Most importantly, the legislative history of the Cable Acts cements our belief that they were not meant to preempt laws of general applicability. In its amendment to the 1992 Act, Congress quite explicitly stated that it did not intend the Cable Acts to dilute enforcement of statutes like the UPA. Congress noted that "[n]othing in [the Cable Television Consumer Protection Act of 1991] shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law." 47 U.S.C. § 521 note, 106 Stat. 1503 ("§ 27").[7] Senator

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[7]Appellants note that § 27 appears only as a note in the codification of the laws. However, it is undeniably part of the Statutes at Large, since it was approved by the Committee and the full Senate, and is part of the "Congressional Findings and Policy for Pub.L. 102-385." The district court properly decided

(continued...)

Metzenbaum's comment that the amendment makes "clear that cable companies will still be fully subject to the antitrust laws," also supports our conclusion that the intent of 47 U.S.C. § 543(a)(1) was not to preempt statutes such as the UPA. 138 Cong. Rec. S 654-01, S 661 (daily ed. Jan 30, 1992).[8] When the intent of Congress is as clear

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[7](...continued)
that § 27 "cannot be relegated to the status of legislative history simply because it is not codified in the United States Code." *See, e.g., Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 808 F.Supp. 646 (N.D. Ill. 1992) (citing section 27 as support for the proposition that state antitrust acts are not preempted).

[8]The context of the remarks in the Congressional Record is as follows: MR. METZENBAUM: The third matter that has been of concern to me has to do with the question of whether or not this act would in any way provide an exemption from the antitrust laws. The amendment [§ 27] makes it clear that cable companies will still be fully subject to the antitrust laws. The amendment is actually needed because S 12 [the 1992 Cable Act] contains provisions which are designed to prevent anticompetitive conduct by cable companies and some cable companies might very well argue that Congress intended to have the procompetitive regulatory provisions of S 12 serve as a substitute for the antitrust laws. This amendment will prevent needless litigation over this issue by clarifying that the antitrust laws still apply in full to the cable industry. ... [I]t is my understanding that this amendment is in accord with the intention of the managers of the bill, and if that is the case, I am prepared to move forward with this amendment. MR. INOUYE: Madam President, the amendment before us is the result of over 10 hours of discussions and consultations involving the distinguished Senator from Ohio, several members of the committee, and countless numbers of staff people. We have studied the amendment very carefully, and we find that it is acceptable. MR. DANFORTH: Madam President, after discussing this matter with Senator Metzenbaum earlier in the day, we have discussed it with the staff of the Judiciary (continued...)

and well-defined as it is here, we "must give effect to [that] unambiguously expressed intent...." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Giving effect to § 27 will not effectively nullify § 543(a)(1). There is a wide range of competitive rates that a cable company could establish that are neither excessive nor below cost. As the district court noted, § 27 and § 543(a)(1) can be reconciled by giving effect to both sections through a reasonable interpretation based on the history and purpose of the Cable Acts. We adopt the district court's suggestion that "[i]n light of the clear mandate of Section 27 that state antitrust laws not be preempted, § 543(a)(1) applies only to those situations involving a statute (or local ordinance) directly aimed at the cable industry and affecting or regulating rates."

Appellants' argument that § 27 has no application outside the scope of the 1992 Act because § 543(a)'s express preemption of state rate regulation predated the 1992 Cable Act is without merit. Section 27 was not added to the 1992 Act to change the preemptive scope of § 543. Exempting rate regulation under the 1984 Act from antitrust laws but then removing that immunity in the 1992 Act would leave an intervening window of eight years. That eight year period not only runs directly counter to the legislative history, but is also plainly impractical.

Lastly, § 556(c) of both Cable Acts, which provides that "any provision of law of any State ... which is inconsistent with this chapter shall be deemed to be preempted and superseded," is not relevant in this instance because the UPA is consistent with the Cable Acts.

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[8](...continued)
Committee ... [T]he amendment is not objectionable ... THE PRESIDING OFFICER: The amendment (No. 1518) was agreed to. 138 Cong. Rec. S 654-01, S 661 (daily ed. Jan. 30, 1992).

Section 556(c) is simply a recognition that Congress did not intend to fully occupy the field of cable television regulation. Because the purposes of the Cable Acts and the state antitrust laws are consistent, and a hypothetical conflict is not a sufficient basis for preemption, the UPA is not preempted by § 556(c). *See Inglis*, 668 F.2d at 1049.

AFFIRMED.

Clerk of the United States Court of Appeals for the Ninth Circuit

100.20, Wisconsin Statutes. Methods of competition and trade practices.

(1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

(1m) It is an unfair trade method of competition in business to represent the retailing of merchandise to be a selling-out or closing-out sale if the merchandise is not of a bankrupt, insolvent, assignee, liquidator, adjuster, administrator, trustee, executor, receiver, wholesaler, jobber, manufacturer, or of any business that is in liquidation, that is closing out, closing or disposing of its stock, that has lost its lease or has been or is being forced out of business or that is disposing of stock on hand because of damage by fire, water or smoke. This subsection does not apply to any "closing-out sale" of seasonable merchandise or any merchandise having a designated model year if the person conducting the sale is continuing in business.

(1r) It is an unfair method of competition in business or an unfair trade practice for a person who sells new motor vehicles to compare new motor vehicle selling prices, including the offered prices or the actual sale prices, to the manufacturer's suggested retail price for that vehicle unless it is clearly and conspicuously disclosed that the latter price is a manufacturer's suggested retail price and may not represent actual sale prices.

(1t) It is an unfair trade practice for a person to provide any service which the person has the ability to withhold that facilitates or promotes an unfair method of competition in business, an unfair trade practice in business, or any other activity which is a violation of this chapter.

(2) The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

(3) The department, after public hearing, may issue a special order against any person, enjoining such person from employing any method of competition in business or trade practice in business which is determined by the department to be unfair or from providing service in violation of sub. (1t). The department, after public hearing, may issue a special order against any person, requiring such person to employ the method of competition in business or trade practice in business which is determined by the department to be fair.

(4) The department of justice may file a written complaint with the department alleging that the person named is employing unfair methods of competition in business or unfair trade practices in business or both. Whenever such a complaint is filed it shall be the duty of the department to proceed, after proper notice and in accordance with its rules, to the hearing and adjudication of the matters alleged, and a representative of the department of justice designated by the attorney general may appear before the department in such proceedings. The department of justice shall be entitled to judicial review of the decisions and orders of the department under ch. 227.

(5) Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount

of such pecuniary loss, together with costs, including a reasonable attorney's fee.

(6) The department may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction the violation of any order issued under this section. The court may in its discretion, prior to entry of final judgment make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action, provided proof thereof is submitted to the satisfaction of the court. The department may use its authority in ss. 93.14 and 93.15 to investigate violations of any order issued under this section.

47 C.F.R. § 76.981 - Negative Option Billing. (eff. 9/1/93).

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. This provision, however, shall not preclude the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent with applicable regulations. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

47 C.F.R. § 76.981 - Negative Option Billing. (eff. 1/1/95 - 59 Fed. Reg. p. 62614).

(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

(b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of a specific channel from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraphs (a) or (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 USC § 543.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

IN THE MATTER OF THE TRADE PRACTICES OF: TIME WARNER ENTERTAINMENT, LP., RESPONDENT	Docket No. COMPLAINT AND REQUEST FOR EXPEDITED HEARING

Pursuant to the provisions of sec. 100.20 (4), Stats., the Wisconsin Department of Justice, by James E. Doyle, Attorney General and Bruce A. Craig, Assistant Attorney General, complains and alleges as follows:

1. This complaint is brought for the purpose of obtaining a special order, issued pursuant to sec. 100.20 (3), Stats., enjoining respondents from engaging in unfair trade practices and unfair methods of competition, as prohibited by sec. 100.20 (1), Stats.

THE RESPONDENTS

2. TIME WARNER ENTERTAINMENT, LP (hereafter TW) is a limited partnership having its headquarters at 300 First Stamford Place, Stamford, Connecticut 06902. TW has about 425,000 customers in the State of Wisconsin and operates, in its own right or through subsidiaries, under the name Time Warner Cable or Warner Cable. Respondent serves the Milwaukee metropolitan area and other communities, including Green Bay, Appleton, Beloit, Menasha, Merrill, Oshkosh, Cedarburg, Elkhart Lake and Eau Claire. As such, it is the largest cable television operator in the State.

3. Other persons not presently named as respondents may also have engaged in or abetted the illegal practices alleged herein. Complainant reserves the

right, subject to the procedural requirements of the Department, to amend this complaint to add other respondents as the interests of justice may dictate.

NATURE OF RESPONDENT'S ACTIVITIES

4. Respondent provides cable television programming to consumers who have subscribed to its services. Until September 1, 1993, respondent's cable programming services consisted of a basic service of about 28 channels, an optional expanded (Standard) service of about 23 channels and several stand alone optional pay channels such as HBO and the Disney Channel.

5. Complainant is informed and believes that respondent's cable customers will be assessed, on respondent's September 1, 1993 invoice, a charge for certain stand alone optional pay channels which have not been ordered, by name, by any cable customer. These new "a la carte" channels are WGN, WTBS, Discovery and E-TV. The charge for each channel will be $1.04. A package of all the optional channels will cost $2.92.

6. The means by which respondent seeks to obtain payment from its cable customers for the "a la carte" channels is by negative option, i.e. by adding a charge for the channels to the customer's bill without previously having received an affirmative order for them by name. It will be the customer's obligation to inform respondent that he or she does not want the unordered optional channels and to ask that the charges be removed from the cable invoice.

7. Complainant is informed and believes that all TIME WARNER customers in Wisconsin, except those taking only the basic service - about four percent of the households served, will be assessed the $2.92 charge. Complainant is further informed that a small number of TIME WARNER's local cable operations may not be

affected by the negative option offering because of local contractual restrictions.

8. Until respondent moved the "a la carte" channels to stand alone optional pay status, WGN and WTBS were part of respondent's basic service (28 channels) and Discovery and E-TV were part of its optional "Standard" service (23 channels). The cable customer had no choice to select, or not select, one the individual channels in question while it was part of a multi-channel service. Respondent does, however, have the right to remove the channel from the multi-channel service without the customer's consent. By removing the "a la carte" channels in question from a multi-channel service to stand alone status, respondent has also removed them from rate regulation, either by the local cable authorities or the Federal Communications Commission.

9. Since respondent intends to implement its negative option program in the immediate future, complainant requests an expedited hearing and resolution of the matters presented herein.

OFFENSE CHARGED

10. The aforestated practices, to be implemented by respondents as alleged, constitute unfair trade practices and unfair methods of competition and are unlawful pursuant to sec. 100.20 (1), Stats.

PRAYER FOR RELIEF

WHEREFORE, the Department of Justice prays for the following relief:

1. Convening an expedited hearing on the matters alleged in the complaint on the basis that respondent's intentions are to implement a negative option charge to its customers no later than September 1, 1993.

Said charge will result in the Wisconsin consuming public being billed in excess of $1,100,000, each month, for cable services which have never been affirmatively ordered, by name, by the cable customer.

2. The issuance of a special order, pursuant to sec. 100.20 (3), Stats., enjoining the above described unfair trade practice and unfair method of competition.

3. An order requiring the disgorgement of all income received by respondent pursuant to the negative option practices above alleged.

4. For such other and further relief as may be just and equitable.

Dated this 31st. day of August, 1993

JAMES E. DOYLE
Attorney General

/s/
BRUCE A. CRAIG
Assistant Attorney General

Attorneys for Complainant,
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STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

IN THE MATTER OF THE TRADE PRACTICES OF: TELE-COMMUNICATIONS, INC.; TCI CABLEVISION OF WISCONSIN, INC.; GWC 106, INC., D/B/A WESTMARC CABLE; VACATIONLAND CABLEVISION INC., D/B/A HERITAGE CABLEVISION, RESPONDENTS.	Docket No. 2294 SPECIAL ORDER

Pursuant to sec. 100.20 (3), Stats., and the record and file herein, IT IS ORDERED that Respondents are hereby jointly and severally enjoined from engaging in the following unfair acts and practices:

Definitions:

1. "Affirmative order" means the unequivocal indication by a cable customer that he or she wishes to order a particular cable service offered at a stated price. Silence or inaction by a cable customer, or the payment of a bill, shall not constitute an affirmative order.

2. To "bill" means to make a request for the payment of a stated amount claimed to be owed respondents for past or future cable services, such as in the "amount due" portion of a customer's invoice.

3. "Cable service" means any service, tier or good which is separately listed on respondents' invoice as a billable item.

4. "Customer" means any person who has contracted with respondents for a cable service or to whom a cable service is offered.

5. "Free" means that a cable service will be provided without charge to the customer and includes terms of similar import.

6. An "invoice" is respondents' itemization and pricing of the cable services provided to a customer and its bill for those services.

Prohibited Practices:

1. Billing a customer for any cable service that the customer has not affirmatively ordered by name. A customer's payment of an invoice containing an unordered charge shall not be deemed to be an affirmative request for the service.

2. Billing a customer for any cable service that has been increased in price from that stated in the customer's affirmative order for the service unless respondents, in a clear and conspicuous manner, provide the customer with a written notice of the increase which:

A. states the price of the service before and after the increase becomes effective,

B. is made in conjunction with the invoice that precedes the invoice imposing the charge and on the invoice imposing the charge,

C. is provided on the invoice or on a document attached to or included with the invoice that is clearly and conspicuously referenced on the invoice, and

D. that includes reference to a procedure by which the customer can accept or reject the service subject to the price increase. This procedure shall permit the customer to avoid the increased charge by indicating his or her rejection of the service on the notice announcing or imposing the charge and returning it with an invoice payment or in a pre-addressed postpaid envelope or card provided by respondents and included with each of the notices.

3. Billing a customer for a cable service which, prior to the billing, had been provided pursuant to the customer's affirmative order of a free service offered by respondents unless:

A. the customer had been informed in a clear and conspicuous manner, prior to the making of the order and in direct proximity to the reference to the fact that the service is free, (1) that a charge will be made in the future for the service, (2) the amount of the charge and (3) the date when the charge will be imposed,

B. either respondents' offer or the confirmation of the customer's order of the free service is in writing and conforms to the form and content requirements stated in subparagraph A. Any written confirmation provided under this subparagraph shall be provided within 30 days of the customer's acceptance and prior to the imposition of any charge.

C. the customer is notified at least 30 days prior to the imposition of the charge and the invoice imposing the charge clearly and conspicuously provides notice that a charge is being imposed for a cable service that was previously provided free.

4. Respondents shall not enter into or attempt to enter into any contract which seeks a waiver of customer rights otherwise created by this order or which would authorize conduct otherwise prohibited by this order.

Relief From Terms of Order:

5. Jurisdiction over this proceeding is retained by the Department. In the event a rule is issued by the Department which regulates the cable industry concerning any of the practices made subject to this Special Order, the Division of Trade and Consumer Protection shall provide the parties with copies of the final rule at the time it is submitted to the Revisor of Statutes. The parties shall have two weeks to inform the Secretary as to the following:

A. All stipulations between the parties which the parties believe should be the basis for the amendment, modification or dismissal of this special order consistent with the rule.

B. All issues which are unresolved between the parties concerning the amendment, modification or dismissal of this special order.

C. Whether the parties require an evidentiary hearing on any unresolved issues.

If an evidentiary hearing is requested by the parties, the Department shall set such hearing within two weeks of notification by the parties. If an evidentiary hearing is not requested, the parties shall have two weeks to submit briefs on the unresolved issues and one additional week for reply briefs. If any issues are resolved between the parties, the stipulation shall be accompanied by a statement as to the reasons the department should order the amendment, modification or dismissal of the special order.

Effective Date: This order shall become effective on October 4, 1993.

Dated this 28th day of July, 1993.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE & CONSUMER
PROTECTION

BY: /s/_____
ALAN T. TRACY
SECRETARY

No. 95-1001

IN THE

Supreme Court of the United States

October Term, 1995

JAMES E. DOYLE, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND ALAN T. TRACY, IN HIS CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Petitioners,

v.

TIME WARNER CABLE, A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Time Warner Cable is an unincorporated division of Time Warner Entertainment Company, L.P. ("Time Warner Entertainment"). Each of the following general partners of Time Warner Entertainment is a wholly owned subsidiary of Time Warner Inc., a publicly traded Delaware corporation:

American Television and Communications Corporation
Time Warner Operations Inc.
Warner Cable Communications Inc.
Warner Communications Inc.

The limited partners of Time Warner Entertainment are:

U S West Multimedia Communications, Inc.,
a subsidiary of U S West, Inc.
Time Warner Inc.
TW/TAE, Inc., a wholly-owned subsidiary of
Time Warner Inc.

The following are non-wholly owned subsidiaries of Time Warner Entertainment:

The Bountiful Company Limited (U.K.)
Century Venture Corporation
Comedy Partners, L.P.
CV of Viera Joint Venture (partnership)
Dagmar Teatret I/S (Denmark) (partnership)
DC Comics (partnership)
Erie Telecommunications, Inc.
Geffen Pictures (partnership)
HBO Asia Holdings, L.P. (partnership)
HBO Pacific Partners, C.V. (Neth. Antiles)
Kabelkom Holding Co. (partnership)
Kabelkom Management Co. (partnership)
Kansas City Cable Partners
Movie World Enterprises Partnership (Australia)

Queens Inner Unity Cable System
Quincy Jones Entertainment Company L.P. (partnership)
Sari Lodge Pty. Limited (Australia)
Scala Biografome I/S (Denmark) (partnership)
Sea World Enterprises Partnership (Australia)
Time Warner Cable of New Zealand Holdings Ltd. (New Zealand)
Time Warner Entertainment Germany GmbH and Co. OHG (Germany)
Time Warner Germany Holding GmbH (Germany)
Turner/HBO Ltd. Purpose Joint Venture (partnership)
Warner Bros. Movie World GmbH & Co. KG (Germany)
Warner-Lusomundo Sociedade Iberica de Cinemas Lda. (Portugal)
Warner & Metronome Films A/S (Denmark)
Warner Mycal Corporation (Japan)

The following are non-wholly owned subsidiaries of the general partners of Time Warner Entertainment:

American Lawyer Media, L.P. (partnership)
The Columbia House Company (partnership)
The Columbia House Company (Canada) (partnership)
Public Cable Company (partnership)

TABLE OF AUTHORITIES

Cases	**Page(s)**
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In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 F.C.C. Rcd. 1164 (adopted and released Aug. 27, 1993) 2, 6

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137 Cong. Rec. S7047 (daily ed. June 4, 1991) 5

INTRODUCTION

1. The Wisconsin Attorney General, James Doyle, asks this Court to review a decision of the Court of Appeals for the Seventh Circuit determining whether the application of a Wisconsin unfair practices law was preempted by a Federal Communications Commission (the "FCC" or the "Commission") regulation in connection with the restructuring of cable television rates and services on September 1, 1993—the day broad rate regulation took effect as a result of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Plaintiff-Respondent Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., opposes that request since the Court of Appeals' decision involved a straightforward application of existing precedents of this Court.[1]

2. Petitioner Doyle grossly exaggerates when he claims that the Court of Appeals' decision has created "uncertainty" for "all consumer protection actions, present and future", casting "a cloud over most consumer action against wrongdoers whose rates are regulated at the federal level". Pet. 22. The Seventh Circuit decision at issue involved an FCC regulation specifically preempting a narrowly defined category of state laws—laws that would impose affirmative marketing obligations on cable operators when they engage in certain restructuring or other similar modifications of their service offerings consistent with FCC-established rate rules. Moreover, the holding of the Seventh Circuit concerns only the application of this preemptive policy to service restructuring undertaken by cable operators (including Time Warner) as part of their efforts to bring their rate and service offerings into compliance with the FCC rate regulations prior to the September 1, 1993 effective date of those regulations.

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[1] Citations to the Petitioners' brief will be in the form of "Pet. __", and citations to its appendix will be in the form of "App. __".

As the FCC has indicated on several occasions, under the unique circumstances surrounding the inception of rate regulation, the application of affirmative marketing requirements to such restructuring would have significantly interfered with cable industry efforts to bring their operations into conformity with their new obligations. *See In Re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, 9 F.C.C. Rcd. 1164, 1209 n.127 (released and adopted Aug. 27, 1993) ("First Order on Recon."); *Warner Cable Communications (Milwaukee, WI)*, LOI-93-14, 10 F.C.C. Rcd. 2103 (Cab. Serv. Bur., adopted Jan. 19, 1995, released Jan. 20, 1995). Indeed, Petitioners' inability to cite any concrete fallout from the Court of Appeals' decision, or the FCC regulation it upheld, lays bare the emptiness of their claim that this Court needs to rectify the outcome.

3. Moreover, Petitioners' claim that the Seventh Circuit's decision conflicts with the decisions in two other circuits is completely unfounded. Aside from being preemption cases involving cable television, those two decisions, *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995) and *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), have nothing in common with the case here. Neither case involved the question of the FCC's statutory authority under the 1992 Cable Act to issue a regulation preempting state law. *Total TV* addressed the question of whether the 1992 Cable Act's rate regulation section itself preempted a California law prohibiting "predatory pricing", not whether the FCC could issue regulations preempting that law. The issue in *Finneran* was whether the rate regulation provisions of a prior statute, the Cable Communications Policy Act of 1984, preempted a state prohibition of a particular charge imposed by cable operators.

BACKGROUND

1.a. September 1, 1993 marked a turning point in national policy concerning communications via cable television. On that date, operators of cable television systems were expected to come into compliance with an extensive and highly complex regime for regulating cable television rates that had been promulgated in May 1993 by the FCC, pursuant to its delegated authority under § 3 of the 1992 Cable Act, 47 U.S.C. § 543. The implementation of rate regulation was an undertaking of enormous proportions. The FCC's Report and Order promulgating its regulations on the subject of cable rates is hundreds of pages long. *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 F.C.C. Rcd. 5631 (adopted Apr. 1, 1993, released May 3, 1993) ("Report and Order"). The FCC's regulations required cable television operators to obtain detailed data and perform complex calculations for virtually all of their systems in order to evaluate and, where necessary, revise their rate schedules and service offerings in an effort to conform to the new regime. *See, e.g., id.* at 6066 (Appendix D).

b. In connection with the implementation of the new rate regulation regime, many cable operators determined to rearrange or "restructure" the "tiers" of service (groups of cable channels) that they offered to subscribers. Congress and the FCC encouraged cable operators to restructure in this fashion, and the Commission used its broad powers under the 1992 Cable Act to clear away many perceived obstacles to that process, which it regarded as essential for inauguration of the new regime on September 1, 1993. The FCC also preempted the application of state laws that had potential to interfere with the restructuring process. Like other cable operators, on September 1, 1993 (the date the FCC directed that cable systems conform to the new price structure), Time

Warner restructured its cable service in the areas where it does business. As part of its September 1 restructuring in each of the Wisconsin systems in question, Time Warner "unbundled" three or four programming services (for example, E! Entertainment Television and The Discovery Channel) that had previously been available only as part of a tier of services, and began to offer them on what is known as an "a la carte" basis. Existing subscribers were unaffected in both the price they paid and the number of channels they received. The unbundling simply provided them with more options: They could separately drop or keep each of the services in question if they wished, merely by contacting the cable system operator.

2. On August 31, 1993, the day before Time Warner's restructuring was to go into effect, Petitioner Doyle filed a Complaint and Request for Expedited Hearing (the "Administrative Complaint") against Time Warner before the Agriculture Department. App. 72. Petitioner Doyle contended that even though the "a la carte" services were already being provided to subscribers as part of the cable service they had ordered, Time Warner was required to seek each subscriber's assent again if it wished to continue to charge for the services, and that Time Warner's failure to confirm subscribers' continued desire to receive the services constituted an improper "negative option" under Wisconsin's "unfair trade practices" statute, Wis. Stat. § 100.20. The Administrative Complaint sought injunctive relief and "disgorgement" of moneys paid by subscribers to Time Warner for the "a la carte" channels. Time Warner, however, believed that the FCC regulation regarding negative options, with which it had complied, preempted the Wisconsin law as it applied to that September 1, 1993 restructuring of services.

3.a. That FCC regulation, embodied in 47 C.F.R. § 76.981, implemented § 3(f) of the 1992 Cable Act, which provided in part that "[a] cable operator shall not charge a

subscriber for any service or equipment that the subscriber has not affirmatively requested by name". 47 U.S.C. § 543(f).

b. The FCC addressed the negative option provision at length as part of its rate regulation proceeding. The Commission perceived that, if interpreted too woodenly, the negative option provision could be said to come into play with respect to any change in service, however trivial. The FCC noted that while the statutory language "applies to 'any service'", the legislative history clarifies that the provision "does not apply to changes in the mix of programming [services] in a tier". Report and Order ¶ 440, 8 F.C.C. Rcd. at 5905-07 (discussing H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 65 (1992)). While operators would be prohibited from adding, at additional cost to subscribers, "new" services which subscribers have yet to "actually receive", the FCC opined that Congress did not intend the negative option prohibition to apply to "change[s] in the mix of channels" or "additions or deletions of channels" unless such changes altered the "fundamental nature" of the service the subscriber had originally ordered. *Id.* at 5906. Indeed, the Act's negative option provision was included in the statute in response to a situation in which another cable operator added a newly-created "per channel" program service to its channel line-up and then proceeded to charge extra for receiving the channel, even though it had *never* previously formed any part of the services ordered by subscribers. *See* 137 Cong. Rec. S7047-48 (daily ed. June 4, 1991) (statement of Sen. Gorton).

c. Similarly, the FCC concluded that, barring some "fundamental change", "restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions", would not violate the negative option prohibition so long as "subscribers will continue to receive the same number of channels and the same equipment". Report and Order ¶ 441, 8 F.C.C. Rcd. at 5907. The Commission reasoned that in such a case "a subscriber

presumably has already 'affirmatively requested' this level of service". *Id.* at 5907-08. Accordingly, as part of its Report and Order, the FCC promulgated a rule concerning negative option billing, which restated the basic statutory prohibition, but also provided:

> "This provision . . . shall not preclude the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, *or the restructuring or division of tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service* provided that such change is otherwise consistent with applicable regulations."

47 C.F.R. § 76.981 (emphasis added).

d. In its Report and Order, the FCC indicated its intention to preempt state laws that were inconsistent with its own negative option billing regulation. Report and Order ¶ 439 n.1095, 8 F.C.C. Rcd. at 5905.[2] The FCC tried to ensure that it remained consistent with the congressional intent to encourage unbundling of services[3] and the Act's negative option billing prohibition on the one hand, and the indication in 47 U.S.C. § 552(c)(1) that Congress did not intend to occupy the field of consumer protection so broadly in the cable area as to oust all state power. In its view, to better effectuate this goal, over the course of the administrative process the FCC ultimately amended the regulation to read:

> "(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service

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[2] *See also First Order on Recon.*, ¶ 86 n.127, 9 F.C.C. Rcd. at 1209.

[3] *See* S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991).

or equipment is not an affirmative request for service or equipment. . . .

"(b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of a specific channel from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

"(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraphs (a) and (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 USC § 543." 47 C.F.R. § 76.981 (effective Jan. 1, 1995). App. 71.[4]

4. On September 21, 1993, Time Warner commenced an action in the United States District Court for the Western District of Wisconsin, seeking a ruling that Wis. Stat. § 100.20 had been preempted insofar as it might apply to the aspect of Time Warner's September 1 restructuring that

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[4] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 F.C.C. Rcd. 1226 (adopted Nov. 10, 1994, released Nov. 18, 1994) ("Going Forward Order"). Interestingly, the Wisconsin Attorney General's Petition never discusses or fully quotes the actual language of the FCC's regulation.

commenced offering "a la carte" channels. The district court granted summary judgment for Wisconsin and Time Warner appealed. The Court of Appeals reversed the district court, finding that the FCC, by regulation authorized under the 1992 Cable Act, preempted the Wisconsin state negative option law to the extent it interfered with a unique—and uniquely Federal—event, the initial implementation on September 1, 1993 of rate regulation under that Act. The Court of Appeals reached this decision applying this Court's precedents regarding statutory interpretation and preemption by agency regulation.

ARGUMENT

Petitioners claim this Court should hear this case because the Seventh Circuit's decision purportedly has "cast a pall" over state consumer protection actions by making "any cost imposing or refund action by a state . . . subject to FCC preemption" (Pet. 27, 28), and because the Court of Appeals' decision allegedly conflicts with decisions of the Ninth Circuit and Second Circuit Courts of Appeals. Pet. 22-27. Neither proposition is true.

1.a. Petitioners offer not one example of a case where the FCC regulation at issue has preempted state consumer law enforcement other than in connection with the September 1, 1993 restructuring of cable rates and services under the 1992 Cable Act. Therefore, the decision by the Court of Appeals does no more than establish that the FCC has the authority to preempt the application of a state law that interferes with implementation of this one federal statute. It did not establish any broad rule of FCC preemption of state law or indicate that the application of state consumer protection laws in other areas (for example, refund actions not involving rate regulation under the 1992 Cable Act) will be preempted.

b. The Court of Appeals faithfully applied this Court's decisions in *Chevron USA Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837 (1984) and *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982), in determining that the FCC had the power to preempt Wisconsin's trade practice law as it applied to Time Warner's September 1, 1993 restructuring. App. 31, 35. According to the court, "the actions of Time Warner were, at the time that it took them, permitted by the federal regulation authorizing a limited range of negative option billing whose prohibition by the states would interfere with the execution of the Commission's rate rules. We believe that the federal regulations, to the extent that they preempt state law, are a permissible interpretation of the congressional authority given the FCC in the 1992 Cable Act." App. 48. The Court of Appeals broke no new ground by its decision.

2. Petitioners describe the Ninth Circuit decision in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995), as holding that the California Unfair Practices Act ("UPA") is not preempted by the "rate regulatory framework of the 1992 Cable Act". Pet. 22. The Wisconsin Attorney General never clearly states why he believes the *Total TV* holding is inconsistent with the Seventh Circuit's decision in this case. This is not surprising since there is no inconsistency. The differences between the issues in the two cases are strikingly clear in several respects.

First, the California statute specifically prohibited predatory pricing and functioned in that respect as an antitrust law. Congress specifically provided that nothing in the Cable Act "should be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law". 47 U.S.C. § 521 note, 106 Stat. 1503 (§ 27). This, the Ninth Circuit found, clearly indicated the intent of Congress that § 543(a)(1) was not to preempt statutes such as the UPA. 69 F.3d at 302-03. The Wisconsin law here was not being applied to address an antitrust problem. Additionally, there

was no similar congressional statement flatly disavowing preemption of state consumer protection laws.

Second, the court in *Total TV* did not find the UPA inconsistent with the Cable Act or any FCC regulation. 69 F.3d at 302, 303 ("the UPA complements, not undermines, the Cable Acts", "the UPA is consistent with the Cable Acts"). Here the application of the Wisconsin statute, as applied to the September 1, 1993 service restructuring, was clearly inconsistent with the FCC regulation at issue.

Third, the *Total TV* court did not discuss either 47 U.S.C. § 552(c)(1), upon which Petitioners heavily rely, or the Seventh Circuit decision in this case—the decision Petitioners claim is directly inconsistent with the result in *Total TV*.

3. Petitioners also claim that the Court of Appeals' decision is inconsistent with the Second Circuit decision in *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), based, it appears, on nothing more than that the Second Circuit there found no preemption of a state regulation while the Seventh Circuit in this case found a state law preempted. In fact, there is nothing inconsistent about the cases.

In *Finneran*, the question was whether a "downgrade charge" was a "rate[] for the provision of cable television service" within the meaning of 47 U.S.C. § 543(a). 954 F.2d at 98. If the "downgrade charge" were found to be such a rate, then, under the terms of the Cable Communications Policy Act of 1984, it was not subject to regulation. *Id.* at 98-99. In *Finneran*, plaintiff CTANY argued that the FCC concurred with its view that downgrade charges were "rates for the provision of cable television services" and cited a footnote in an FCC decision to that effect. *Id.* at 99. The Second Circuit rejected CTANY's argument, based primarily on its conclusion that "[t]here is no indication that the FCC

considered the pre-emptive reach of its statement". *Id.* at 100.[5] Thus in *Finneran*, unlike this case, the scope of the FCC's preemptive regulations was not at issue, nor was the statutory authority of the FCC to preempt.

Moreover, the actual practice at issue here (billing for services customers continue to receive) is entirely different from the practice at issue in *Finneran* (imposition of a charge when cable customers drop services). Thus, the *Finneran* case is far removed from the situation in this case—so much so that the Court of Appeals majority, although mentioning *Finneran* on two other issues (App. 38 n.9, 41 n.13), saw no need to distinguish the *Finneran* court's holding in reaching their conclusion on preemption. Indeed, if the Seventh Circuit's decision here stands, the holding in *Finneran* will not be subject to question. If the Seventh Circuit's decision is reversed, *Finneran*'s validity will be neither enhanced nor diminished.

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[5] Moreover in *Finneran*, that court twice focused on the fact that the statement plaintiff was relying on for its preemption argument was contained in the FCC's discussion of a section of the 1984 Cable Act (47 U.S.C. § 543(b), amended by the 1992 Cable Act) which had the effect of *authorizing* (as opposed to precluding) state regulation of cable company rates under certain circumstances. 954 F.2d at 99-100.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

January 22, 1996.

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No. 95-1001

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

JAMES E. DOYLE, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND ALAN T. TRACY, IN HIS CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Petitioners,

v.

TIME WARNER CABLE, A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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No. 95-1001

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PETITIONERS' REPLY MEMORANDUM

ARGUMENT

Time Warner contends that the Seventh Circuit decision relates only to a "uniquely Federal" event, the implementation of FCC rate regulation on September 1, 1993 (Res. 8). It states that petitioner "grossly exaggerates" the impact of the Seventh Circuit decision because it was limited to state laws which "would impose

affirmative marketing obligations on cable operators when they engage in certain restructuring . . ." (Res. 1).

This is an attempt to minimize a decision which held, with preemptive force, that any state effort to seek restitution was *de facto* rate regulation (App. 47) and that state consumer efforts conflicted with a federal administrative "rate structure" (App. 47-48) which, under the facts in this case, authorized a practice prohibited by federal law, 47 U.S.C. § 543(f).

Although the factual setting before the Seventh Circuit concerned a time when rate regulation was about to be imposed on cable operators, the Court's legal conclusions went far beyond those narrow confines. It held that the FCC had the authority, whenever its "rate structure" was threatened, to declare a preemptive conflict with state consumer actions. This ruling did not state that Wisconsin was regulating rates (except for its restitution request) but only that its consumer action would "discourage the provision of new services at a reasonable cost [and] . . . would act as a significant incentive to carriers to freeze service offerings." (App. 47).

Such a ruling gives unbridled authority to a federal administrative agency to preempt state action whenever it declares, by rule, that the action would inconvenience those it regulates. As a precedent, it can, and will, be invoked by any federal agency or affected business seeking to stifle troublesome state consumer enforcement actions. It is a green light for the FCC to invoke similar preemptive regulations in the future.[1] As stated in the dissent to the Seventh Circuit decision, App. 54-56:

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[1] The FCC has already paved the way in this respect. Subsec. (c) of its rule (App. 71) prohibits state actions which would "undermine" the rule or any other rule promulgated under sec. 3 of the Cable Act.

> The majority here argues that "the transaction costs involved in complying with a state negative option [will] impact on the rate rules by discouraging the provision of new services at a reasonable cost," . . . This reasoning, taken to its logical end, is also potentially unbounded as it results in all state consumer laws being classified as "rate structures." *Such an interpretation would require all consumer protection laws to be preempted since all such regulation potentially affects cable rates--albeit indirectly.* (emphasis supplied)

The Seventh Circuit ruling that a state restitution action constitutes the regulation of rates is anything but minimal or situation specific. It would provide a direct precedent for preemption in respect to any state enforcement action seeking restitution against an entity that is rate regulated at the federal level, or where rate regulation is prohibited.

The decision below has already[2] resulted in a Florida state court ruling in *Francis Pala, on behalf of herself and all others similarly situated v. Continental Cablevision, Inc*, Broward County Circuit Court, Case No. 94-10854 (09), set forth in the appendix to this brief (R. App. 1-3). The case, a private class action, relates to an offering similar to that of Time Warner's. The Court explicitly relies on the Seventh Circuit decision by stating (R. App. 2, par. 5):

> This Court is persuaded by the reasoning of the Seventh Circuit Court of Appeals in *Time Warner v. Doyle*, 66 F.3d. 867 (7th. Cir. 1994), that because of the relief sought by Plaintiff, whether under statutory *or*

---

[2] The ruling is less than four months old.

> *common law*, would result in a refund or disgorgement of sums by a Continental entity such relief would constitute rate regulation and, accordingly, under the concept of conflict preemption, is preempted by federal law. (emphasis supplied)

The *Pala* court used the precedent in this case to extend the scope of federal preemption to private common law actions as well as those statutorily authorized.

The factual and legal setting in this case demonstrates the unacceptable extent to which the FCC has placed the convenience and economic interests of the regulated cable operators over the long standing and critical enforcement efforts of state officials charged with protecting the economic interests of the consuming public.

Under the vague banner of "restructuring" the FCC has established an administrative precedent which permitted Time Warner and others to bill cable customers - representing in total over 60% of the citizens in this country - for services which had never been ordered.

Contrary to Time Warner's claim that its creation of new cable services was to bring its practices "into compliance with FCC rate regulations prior to the September 1, 1993 effective date of those regulations" (Res. 1), its unbundling in fact resulted in billing customers for services that had never been ordered "by name". This practice was in direct violation of the prohibitions of the federal negative option law, § 543(f). As succinctly stated by the District Court "the FCC is not free to ignore the "by name" requirement (App. 11). Whatever "conflict" existed in this action was not between state and federal enforcement goals but rather between federal law and the FCC regulations.

Not only was the FCC regulation contrary to federal law, it ignored, in the name of cable operator convenience, the long standing doctrine that consideration of a preemption issue such as that before the Court "start[s] with the assumption that the historic police powers of the States [are] not to be superseded . . . by Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992), *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The factual and legal situation presented here contains an unequivocal statement by Congress that "nothing" in the Cable Act is to be construed to prohibit state consumer protection actions unless those actions are specifically preempted "by this subchapter [the Cable Act]," § 552(c)(1).

Time Warner characterizes this provision as one indicating that "Congress did not intend to occupy the field of consumer protection so broadly . . . as to oust all state power." (Res. 6) While this may be the intent of certain "savings" provisions in federal law, indicating the absence of "field" preemption, that is not the case here. 47 U.S.C. § 552(c)(1) was changed in 1992 (see Pet. 10, 21-22) from a "savings" type law to one which *denied* anyone the right to construe the Cable Act in a manner which imposed federal preemption on state consumer enforcement actions, except in the case of specific Congressional preemption.

The analog for this type of legislation is found in *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 358-59, 373-75 (1986). Similar to the language in 47 U.S.C. § 552(c)(1) of the Cable Act, 47 U.S.C. § 152(b), applicable in *Louisiana*, provided that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction" with respect to intrastate communication service. Based on this language, the *Louisiana* Court struck down an FCC order which claimed

to preempt state depreciation procedures for intrastate telephone service on the grounds that the federal policy of "increasing competition" would be thwarted. In responding to argument supporting the FCC order, this Court stated:

> The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for pre-emption. . . . [A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional ***denial*** of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate rate-making purposes. Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do. (emphasis supplied)

Louisiana Public Service Com'n, 476 U.S. at 374-75.

Like 47 U.S.C § 152(b), 47 U.S.C. § 552(c)(1) represents not a "savings" law but an explicit *denial* of the right of the FCC to construe the Cable Act so as to preempt a state consumer action, unless the subject of that action has been "specifically" preempted by law. To argue, as does Time Warner, that the reference to specific preemption by the Cable Act included preemption by the FCC, would be to render the 1992 change in the law as meaningless since no other entity, in this context, is in the position to construe the Cable Act as having preemptive effect.

Respondent's contention (Res. 9-11) that *Total TV v. Palmer Communications*, (No. 94-55112 - 9th Cir.) decided October 24, 1995, App. 57-66, and *Television Ass'n v. Finneran*, 954 F.2d 91, 101 (2d Cir. 1992) are not in conflict with the Seventh Circuit is without basis. Both cases established that federal preemption concerning the "regulation of rates" does not extend to matters which might affect rates (Pet. 22-27). *Total TV* involved practices covered by the California Unfair Practices Act, (Pet. 22) this action involves the Wisconsin Unfair Practices Act (App. 67).

The legal principles established in these cases apply whether the Court is reviewing a specific state action or the conclusions of an administrative agency.

Finally, Time Warner posits in its factual recitation that the practices in question were of no adverse consequence, i.e. "no harm no foul." It states at p. 4 of its brief that "Existing subscribers were unaffected in both the price they paid and the number of channels they received."

Normally, this factor would have nothing to do with the legal issues presented here, however it was referenced by the Seventh Circuit "Only the format of the services for which they were paying had changed" (App. 22) and the *Pala* Florida ruling where the court stated, at par. 3

(R. App. 1-2), that the billing for unordered and optional services constituted "no fundamental change in service or rates in that Plaintiff 'continued to receive the same number of channels and the same equipment.'"

The reference to this factor in both cases implies that the ruling judges felt the preemption was of little consumer significance.

Billing for new and unordered services is anything but insignificant. The FCC rule, App. 71, par. (b), refers only to retiering changes that "do not constitute a fundamental change in the nature of an *existing* service or tier of service." There probably was no fundamental change in the existing "Basic" and "Standard" services, each lost two of twenty plus channels and the price was reduced. The "fundamental change" here, unaddressed by the Court or the FCC, was that four new, unordered and optional services were created, free from rate regulation, and billed to the customer without ever having been ordered "by name."

The Seventh Circuit ruling is critically flawed and deserves review by this Court. For it to remain in place would undermine virtually every state consumer action that impacts in any way upon an entity governed by federal rate preemption.

CONCLUSION

For the reasons above stated, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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January 26, 1996

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 94-10854 (09)

FRANCES PALA, on behalf of herself and all others similarly situated,

Plaintiff,

v.

CONTINENTAL CABLEVISION, INC., a Delaware corporation,

Defendant

ORDER ON MOTION OF ALL DEFENDANTS FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECOND AMENDED COMPLAINT

THIS CAUSE having come on to be heard before the Court, argument of counsel having been heard and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. There is no material issue of fact in this case that Plaintiff, prior to September 1, 1993, was a subscriber to American Cable systems of Florida, Ltd. and subscribed to Lifeline Basic and Satellite Service tiers. Those tiers were comprised of 46 channels of programming.

2. There is no material issue of fact that after the implementation of Federal Communications Commission's ("FCC") rules and orders on September 1,

1993, Plaintiff continued to receive 46 channels of programming although subdivided into three tiers of service.

3. Under the FCC regulations that went into effect on September 1, 1993, this retiering of services constituted no fundamental change in service or rates in that Plaintiff "continued to receive the same number of channels and the same equipment "after September 1, 1993" as she received before that date. Accordingly, there is no fundamental change in service. *In the Matter of Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266 Report and Order and Further Notice of Proposed Rule Making, 8 FCC rcd 5631 ¶440, 441 (1993).

4. Furthermore, Continental was ordered by the FCC to retroactively adjust rates to September 1, 1993 and all state and federal notice requirements were specifically preempted by the FCC. *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket 920266 Order Released July 27, 1993.

5. This Court is persuaded by the reasoning of the Seventh Circuit Court of Appeals in Time Warner Cable v. Doyle, 66 F.3d 867 (7th Cir. 1994), that because the relief sought by Plaintiff, whether under statutory or common law, would result in a refund or disgorgement of sums by a Continental entity such relief would constitute rate regulation and, accordingly, under the concept of conflict preemption, is preempted by federal law. Any statutory or common law claim that would affect the rate regulation or retiering effective September 1, 1993 is preempted by federal law.

6. Furthermore, Continental was ordered to retroactively adjust its rates to September 1, 1993, was

ordered to implement the change notwithstanding any notice requirements under federal or state law, and was specifically permitted to retier its services in the matter implemented on September 1, 1993. Accordingly, under Florida Statute § 501.212(1) the acts complained of by Plaintiff are acts or practices required or specifically permitted by federal law and Florida's Deceptive and Unfair Practices Act is inapplicable.

WHEREFORE, IT IS ADJUDGED:

7. Summary Judgment is hereby granted for all Defendants on all claims brought by Plaintiff.

DONE AND ORDERED in Chamber in Fort Lauderdale, Broward County, Florida this 22nd day of December, 1995.

/s/ KATHLEEN A. KEARNEY
Circuit Court Judge

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